No. 90-6352-CFY
Status: GRANTED

Title: Diane Griffin, Petitioner
v.
United States

Docketed:
November 27, 1990

Court: United States Court of Appeals
for the Seventh Circuit

Counsel for petitioner: Logan,Michael G.

Counsel for respondent: Solicitor General

Entry	Date	Note	Proceedings and Orders
1	Nov 27 1990	G	Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed.
4	Dec 21 1990		Order extending time to file response to petition until January 28, 1991.
5	Jan 28 1991		Brief of respondent United States filed.
6	Jan 31 1991		DISTRIBUTED. February 15, 1991
8	Feb 19 1991		Petition GRANTED.
			**********
9	Mar 4 1991	G	Motion of petitioner for appointment of counsel filed.
10	Mar 8 1991		Record filed.
		*	USDC ND IL-2 vol. received.
11	Mar 11 1991		DISTRIBUTED. MARCH. 15, 1991.
12	Mar 14 1991		Record filed.
		*	USCA 7-one vol. received
14	Mar 14 1991		Joint appendix filed.
13	Mar 18 1991		Motion for appointment of counsel GRANTED and it is ordered that Michael G. Logan, Esquire, of Chicago, Illinois, is appointed to serve as counsel for the petitioner in this case.
15	Apr 23 1991		Brief of petitioner Diane Griffin filed.
16	May 8 1991		Brief of respondent United States filed.
18	Jul 2 1991	X	Reply brief of petitioner Diane Griffin filed.
17	Jul 15 1991		CIRCULATED.
19	Jul 19 1991		SET FOR ARGUMENT MONDAY, OCTOBER 7, 1991. (3RD CASE)
20	Sep 16 1991	X	Supplemental brief of petitioner Diane Griffin filed.
21	Oct 7 1991		ARGUED.

APPEARANCE

CASE NO. 90-6352

(Seventh Circuit No. 88 2988)

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1990

DIANE GRIFFIN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

The Petitioner, Diane Griffin, by her Attorney, Michael G. Logan, moves pursuant to Supreme Court Rule 46, for leave to proceed in forma pauperis before this Court. In support of her motion, the Petitioner states that the Petitioner has, under the Criminal Justice Act of 1964 (18 U.S.C. Section 3006A), been represented by appointed counsel throughout the proceedings below and remains without sufficient funds to afford counsel or payment of costs.

WHEREFORE, Petitioner respectfully prays that an Order be entered granting her leave to proceed in forma pauperis.

/ Michael G. Logan
Michael G. Logan,
Counsel for Petitioner

MICHAEL G. LOGAN
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1-312/641-9090
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CASE NO.

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1990

DIANE GRIFFIN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition for Writ of Certiorari

to the

United States Court of Appeals

for the Seventh Circuit

To the Honorable the Chief Justice of the Supreme Court of the United States and the Associate Justices of the Supreme Court of the United States:

QUESTIONS PRESENTED FOR REVIEW

Whether the general jury verdict of guilty against a single defendant is reversible under a duel object conspiracy count in a multi-defendant drug prosecution where a general verdict renders it impossible to say whether the defendant was convicted by the jury based on the object unsupportable as a matter of law or on the remaining "supportable" object.

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for the Seventh Circuit

MICHAEL G. LOGAN

Attorney at Law

77 West Washington

Suite 1708

Chicago, Illinois 60602

Attorney for Petitioner

OPINIONS DELIVERED IN COURTS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit has not yet been reported. The opinion of the Seventh Circuit in this case is reproduced in the Appendix to this Petition.

JURISDICTIONAL STATEMENT

The opinion, order and judgment of the Seventh Circuit Court of Appeals sought to be reviewed were dated and entered September 7, 1990. No petition for re-hearing was filed. Judgment of the Court of Appeals in this case is a final judgment. The statutory provision believed to confer jurisdiction on this Supreme Court to review this case is 28 U.S.C. 1254(1).

STATUTES INVOLVED IN CONSTITUTIONAL PROVISIONS

The Defendant was convicted of violation of 18 U.S.C. Section 371. No issues are raised involving the statute itself.

This case concerns the constitutionally secured right to due process of law under Amend. V, and the constitutionally secured right to a jury trial under Amend. VI.

Amend V. (1791).

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment VI (1791).

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of their State and District wherein the crime shall have been committed, which District shall been previously ascertained by a law, and to be informed of the nature and cause of the acquisition; to be confronted by the Witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the assistance of Counsel for his defense.

STATEMENT OF THE CASE

This is a criminal case. Defendant, Diane Griffin, was charged in one Count, Count 20, of a 23 Count indictment with conspiracy to defraud the United States by two objects. The first object was to impede, impair, obstruct and defeat the lawful functions of the Department of the Treasury, in particular, the Internal Revenue Service, in the ascertainment, computation, assessment and collection of the revenue: to wit, income taxes. The second object was to impede, impair, obstruct and defeat the lawful functions of the Department of Justice, in particular, the Drug Enforcement Administration, in the ascertainment of forfeitable assets.

At the end of the government's case and at the end of the entire case, the government and the trial judge agreed that there was no competent evidence in the case that Griffin had knowledge of drug dealing activities by the co-defendants or any person. The trial court refused to modify the jury instructions submitted by the government so that the jury would only consider the Internal Revenue Service objective of the duel objective conspiracy charge or require the jury to specify which of the two objectives the jury found that defendant Griffin had knowledge.

The jury found defendant guilty of the conspiracy in Count 20, but it is unknown whether the jury found that Griffin had knowledge of the Drug Enforcement Administration objective or the Internal Revenue Service objective. She moved for a new trial on the basis that error was made in failing to remove the D.E.A. objective as a basis for conviction through use of proper jury instructions. That motion was denied. The trial court sentenced the defendant to five years probation on the condition that she complete six months of work release and five hundred hours of community service. It is from this conviction, sentence and the affirmance of the United States Court of

Appeals for the Seventh Circuit that the defendant now seeks a Writ of Certiorari. The Seventh Circuit found that where the one object in a multi-object conspiracy was unsupported by the evidence as opposed to being legally insufficient the guilty verdict is valid as long as there is sufficient evidence on the other object even if it is not known which object of the conspiracy the jury found as the predicate for the conviction.

The Seventh Circuit found that when there is a dual object conspiracy count where the one object is not factually supportable but the other object is factually supportable and the jury returns a general verdict not specifying upon which ground or upon which object the jury found guilt, the conviction must not be set aside even if it is impossible to tell which object the jury selected; however, if the factually unsupported object had been instead a legally insufficient object than the conviction must be set aside since it is impossible to tell whether the jury selected the legally insufficient object.

REASONS FOR ALLOWANCE OF THE WRIT

Violation of Right to Due Process and Jury Trial

The Court should exercise its discretion in allowing issuance of a Writ of Certiorari in this case because the Seventh Circuit Court of Appeals has rendered a decision in conflict with the decisions of other Federal Courts of Appeals on the same matter. The Seventh Circuit in its issued but unpublished opinion in this case held that in a dual object conspiracy count where one of the objects is factually supportable, but the other object is not factually supportable a jury's general verdict of guilty is not reversible even if it is impossible to tell which object the jury selected. See also United States v. Alvarez, 860 F. 2d 801 (7th Cir. 1988); United States v. Holguin, 868 F. 2d 201 (7th Cir., cert. denied, 110 S. Ct. 97 (1989); United States v. Soteras, 770 F. 2d 641, 646 (7th Cir. 1985); United States v. Sababu, 891 F. 2d 1308 (7th Cir. 1989).

This exact issue concerning the validity of a general verdict in a dual object conspiracy case where one of the objects was unsupported by the facts in the case was reached by the United States Court of Appeals for the Second Circuit in United States v. Garcia, 90-1088, slip op. at 3 (2d Cir. June 29, 1990). The Second Circuit found that a new trial was required because one of the two objects of the conspiracy was not established by the evidence and the court could not determine which object of the conspiracy the jury relied upon in finding the defendant guilty.

The issue was also reached by the United States Court of Appeals for the Third Circuit in United States v. Dansker, 537 F. 2d 40 (3rd Cir. 1976). The Third Circuit held that where in a dual objective conspiracy the evidence was insufficient to support conviction under one objective and the jury returned a general verdict, the dual objective conspiracy count must be reversed.

The United States Court of Appeals for the First Circuit has relied on the ruling by the United States Court of Appeals for the Second Circuit in United States v. Natelli, 527 F. 2d 311 (2nd Cir. 1975) cert. denied, 425 U.S. 934 (1976) in reversing general verdict multi-object convictions under 18 U.S.C. Section 371. Natelli found that the general verdict in the case was ambiguous therefore reversible where one object in the multi-object count was unsupported by the evidence.

In essence the Seventh Circuit Court of Appeals has ruled that when there is a dual object conspiracy where the jury returns a general verdict and one of the objects of the conspiracy is legally insufficient, the jury's verdict of guilty must be reversed because it cannot be determined whether or not the jury convicted on a legally insufficient object; however, if there is a dual object conspiracy where the jury returns a general verdict where one of the objects of the conspiracy is factually insufficient, i.e. the facts in the case could never as a matter of law support a guilty finding, the jury's verdict may not be reversed even if we do not know if the jury convicted the defendant on the object of the conspiracy which did not have sufficient evidence as a matter of law to support it.

More simply, if the jury convicts a person on a basis where the law pertaining to the constitution says that he cannot be convicted, the person cannot be convicted and if the jury convicts a person on a basis where the law pertaining to the statute of limitations says that he cannot be convicted, the person cannot be convicted, but if the jury convicts a person on a basis where the law pertaining to the sufficiency of the evidence says that he cannot be convicted, the person can be convicted.

This anomaly adhered to by the Seventh Circuit strikes at the heart of this court's reasoned decision in Yates v. United States, 354 U.S. 298 (1957). Under Yates there should never be an allowance of the possibility that a defendant be convicted

by a jury on a legally insupportable basis whether that be the cause of unconstitutionality, violation of a statute of limitations or legally insufficient evidence. The distinction that the Seventh Circuit has drawn between a legally insufficient object and a factually inconsistent object is a distinction without a difference.

Because the decision of the Seventh Circuit conflicts with the decisions of the United States Court of Appeals for the Third District, the United States Court of Appeals for the Second District and the United States Court of Appeals for the First District and apparently conflicts with the prior reasoning of the United States Supreme Court on this issue, this court ought to grant Griffin's Petition for Writ of Certiorari.

CONCLUSION

For the foregoing compelling reasons, this Court should grant the Petition for Writ of Certiorari.

Respectfully submitted
DIANE GRIFFIN

By: Michael G. Logan
Michael G. Logan,
Her Attorney

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APPENDIX

Copy of the Seventh Circuit's Opinion in the United States v. Diane Griffin

Copy of the Seventh Circuit's Order

Copy of the Count 20 of Griffin's indictment

In the

United States Court of Appeals

For the Seventh Circuit

Nos. 88-2985, 88-2986, 88-2987 and 88-2988

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

ALEX BEVERLY, BETTY MCNULTY, GEORGE BROWN and DIANE GRIFFIN,

Defendants-Appellants.

On Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. No. 87 CR 521—**Ann Claire Williams**, *Judge.*

ARGUED OCTOBER 27, 1989—DECIDED SEPTEMBER 7, 1990

Before EASTERBROOK and RIPPLE, *Circuit Judges*, and ESCHBACH, *Senior Circuit Judge.*

RIPPLE, *Circuit Judge.* A jury found the defendants—Alex Beverly, Betty McNulty, George Brown, and Diane Griffin—guilty of various drug trafficking and/or conspiracy offenses. The defendants appeal their convictions on a multitude of grounds. For the following reasons, we affirm.

I

BACKGROUND

On February 10, 1988, a federal grand jury returned a twenty-three count superseding indictment against the de-

fendants.[1] The indictment alleged two conspiracies: count one charged Alex Beverly, George Brown, and Betty McNulty with conspiring to distribute and possess with the intent to distribute heroin and cocaine in violation of 21 U.S.C. § 841(a)(1). Count twenty alleged that Alex Beverly, Betty McNulty, and Diane Griffin conspired to defraud the United States by impairing the efforts of the Internal Revenue Service (IRS) and of the Drug Enforcement Agency (DEA) in ascertaining income taxes and forfeitable assets, respectively, in violation of 18 U.S.C. § 371. In addition to the conspiracies, the indictment charged Alex Beverly, Betty McNulty, and George Brown with multiple narcotics-related offenses. Mr. Beverly also was charged with engaging in a continuing criminal enterprise in violation of 21 U.S.C. § 848. Diane Griffin was charged with only the fraud conspiracy.

A. *Facts*

1. Narcotics transactions

a. Alex Beverly, George Brown

From at least 1980 to 1986, Alex Beverly controlled a large-scale narcotics operation involving George Brown, Betty McNulty, and others. Mr. Beverly purchased drugs through Peter Suarez, a cocaine supplier and government witness.[2] The two men first met in late 1979. Mr. Beverly

[1] The original indictment was returned against Alex Beverly, George Brown, Betty McNulty, Willie Jordan, Joseph McCorkle, and Charles Avant. The superseding indictment was returned against Alex Beverly, George Brown, Betty McNulty, Diane Griffin, McCorkle, and Avant. Jordan died before the case was tried, McCorkle was found not guilty on all counts, and Avant pled guilty.

[2] Suarez testified at trial pursuant to a plea agreement stemming from drug charges in a separate case. Because he had been convicted previously on similar charges, he was a second offender facing up to forty years in prison. Under the plea agreement, he cooperated with the government in exchange for being treated as a first time offender. Suarez was granted immunity for his testimony in this case and ultimately was sentenced to eight years in prison in the separate case.

was attempting to open an after-hours club in a house on Sangamon Street in Chicago and told Suarez that he needed some cocaine to start the business. Approximately one month later, Suarez met Mr. Beverly at the house on Sangamon. The house was equipped with gambling tables and a bar from which drinks and cocaine were being sold. Suarez met Willie Jordan, who was introduced as Mr. Beverly's "righthand man," and George Brown, who was introduced as Mr. Beverly's "close associate, brother like." Tr. at 729, 730. On this occasion, Suarez sold Mr. Beverly roughly two ounces of cocaine. Over the next few months, Suarez returned to the Sangamon address several times to deliver another two to three ounces of cocaine. Both Mr. Beverly and Mr. Brown were present for each transaction, as was Jordan.

In March 1980, the police raided the Sangamon house and arrested everyone present for gambling, including Suarez, who was there to deliver cocaine. He stopped making deliveries after the raid, but resumed when Mr. Beverly contacted him the next month. In late April of 1980, Suarez went to an apartment on Chicago Avenue and delivered four ounces of cocaine; Mr. Beverly diluted the drug and converted it into rock cocaine. He then gave the cocaine to George Brown and instructed him to take it to a Mayfield Avenue address. Mr. Beverly told Suarez that he had opened a house on Mayfield and was "going to start doing a lot of business out of that house and that he was going to increase the buys of cocaine and the sales." Tr. at 741-42.

Suarez delivered cocaine to Mr. Beverly at the Chicago Avenue apartment several more times, then began making regular deliveries to Mr. Beverly at the house on Mayfield.[3] From 1980 until 1982, Suarez delivered as much as half a kilogram of cocaine to Mr. Beverly as often as once a week. While he was there making deliveries or

[3] Like the Sangamon house, the Mayfield property was outfitted as a gambling establishment.

waiting to be paid, Suarez observed Mr. Brown selling small packages of white powder for $50 and $100. He also observed Mr. Brown convert cocaine from powder to rock form for customers, who then would smoke the drug.

Toward the end of 1981, Suarez became interested in establishing drug connections in Colombia. He continued to supply Mr. Beverly with cocaine, but introduced Mr. Beverly to a friend from Florida who would service Mr. Beverly's drug needs in the interim. Suarez participated in two of these referral drug transactions, one in Florida and one at the Mayfield house in Chicago, in which Mr. Beverly purchased cocaine from Suarez' friend. In July of 1982, Suarez was arrested in Puerto Rico as he tried to bring Colombian cocaine into the United States. He was convicted and imprisoned until December 4, 1985. Shortly after his release, he contacted Mr. Beverly. They met in Chicago in late March of 1986 at a bar called Mercedes.[4] Further cocaine transactions were discussed but no deals were arranged because Mr. Beverly did not have cash available and Suarez could not sell on credit.

In April 1986, Mr. Beverly contacted Suarez and asked to purchase two kilograms of cocaine. Suarez, who was living in Florida, arrived in Chicago on the weekend of April 11, 1986. On April 13, Mr. Beverly, who did not have enough money for both kilograms, purchased half a kilogram of cocaine for $12,000. The men met at Tit's Bar, a business Mr. Beverly had purchased for his girlfriend, Diane Griffin, then went next door to Blacon's Liquor Store, a business owned by Mr. Beverly. George Brown arrived at Blacon's with $10,000 in cash; Mr. Beverly took $2,000 out of the cash register at Tit's to make up the difference. Upon Mr. Beverly's direction to take the drugs back to the Mayfield house, Mr. Brown

[4] Wesley's Drive-In, George Brown's business, is located on the property adjoining the Mercedes bar. The bar originally was named Somons, but was renamed Mercedes sometime in 1986. Because another establishment called Somons Lounge is involved in this case, the original Somons will be referred to as Mercedes.

left the liquor store with the cocaine. Mr. Beverly then told Suarez that he would be in touch in the future whenever he needed more cocaine. They agreed that the next deal would take place somewhere between Florida and Chicago so that Suarez, who was on parole, would not have to be away from the Miami area for any great length of time.

Toward the end of April 1986, Mr. Beverly again contacted Suarez and indicated that he needed two kilograms of cocaine. The pair agreed to meet in Mobile, Alabama, where, on the first weekend of May 1986, Mr. Beverly paid Suarez $52,000 in cash for two kilograms of cocaine. Suarez travelled to Chicago two weeks later at Mr. Beverly's request to deliver another two kilograms of cocaine. They met at Somons Lounge, another one of Mr. Beverly's properties, on May 17. Mr. Beverly telephoned George Brown, who appeared at Somons with $27,000 in cash, enough for one kilogram of cocaine. Suarez took the cash and gave the cocaine to Mr. Beverly, who instructed Mr. Brown to take the drugs back to the Mayfield house.

This routine was repeated throughout the summer and fall of 1986. On June 21, Suarez and Mr. Beverly met at Tit's. Suarez said hello to Diane Griffin, who was working behind the bar, then accompanied Mr. Beverly to the back of Blacon's Liquor Store. Following a telephone call from Mr. Beverly, Mr. Brown arrived with $27,000 in cash. Mr. Beverly purchased one kilogram of cocaine, which he gave to Mr. Brown with directions to return to the house. On July 20, Mr. Beverly and Suarez waited at Blacon's until Mr. Brown arrived with, on this occasion, $10,000. Although Suarez charged $27,000 per kilogram, he gave Mr. Beverly a full kilogram of cocaine and said he would get the rest of his money later. On July 30, Suarez went to Somons Lounge to collect the debt. Mr. Beverly stated that he did not have the money but planned to gamble that night; the next morning, Mr. Beverly gave Suarez $10,000 in cash. On both August 9 and 24, Mr. Beverly purchased one kilogram of cocaine with money delivered at Mr. Beverly's request by George Brown. The first trans-

action took place at Somons with a purchase price of approximately $28,000; the second took place at Blacon's with a price of $27,000. On both occasions, Mr. Beverly gave the drugs to Mr. Brown with instructions to return to the house.

Mr. Beverly made two drug purchases in October. On October 18, Suarez and Mr. Beverly met at Somons Lounge, then drove to a woman's house and picked up a bag of cash. They then returned to Somons, where Mr. Brown was waiting with another bag of money. Together, the bags contained approximately $32,000 in cash, for which Mr. Beverly received a kilogram of cocaine. On his next trip to Chicago, Suarez met Mr. Beverly at Blacon's Liquor Store.

The last meeting between Mr. Beverly and Suarez took place in Florida on November 7, 1986. Suarez had completed a sale of one kilogram of cocaine to Mr. Beverly's associate, Joseph McCorkle, before Mr. Beverly and several friends arrived in Miami for a football game. Suarez had a brief discussion with Mr. Beverly to explain that McCorkle had left Florida with the cocaine. The following weekend, on November 17, 1986, Suarez was arrested in Las Vegas, Nevada for possession with intent to distribute three kilograms of cocaine.

Evidence regarding these defendants' narcotics transactions also was provided by Johnny Davis, a paid informant for the DEA.[5] At the time he began working for the DEA, Davis had known Mr. Beverly for more than twelve years. On March 24, 1986, Davis went to the Mercedes

[5] Davis began working for the DEA in mid-March of 1986, after moving out of his home due to arguments with his wife. The quarrels concerned Mrs. Davis' relationship with Betty McNulty, who used drugs in the Davis home and persuaded Mrs. Davis to pick up more drugs for her. At the time of trial, Davis had been paid some $37,000 by the DEA for information supplied in this and other narcotics investigations. He was to receive an additional $10,000 following the trial, conditioned on his giving truthful testimony.

bar to arrange the purchase of one ounce of brown heroin. Davis met with Willie Jordan and, in order to get a DEA agent involved, stated that he had a friend interested in buying some heroin. Two days later, Davis returned to Mercedes with undercover DEA agent Herbert Milton. They spoke with Mr. Beverly, who made two calls from a private phone behind the bar, during one of which Davis heard Mr. Beverly ask whether "Johnny is still all right." Tr. at 242. Mr. Beverly spoke privately to Willie Jordan for a few minutes, after which Jordan handed a package to Davis. Davis observed that the package was a clear plastic bag containing what looked like brown heroin. He passed the bag to Agent Milton and gave Jordan $950. Laboratory tests later revealed that the bag contained 24.93 grams of 2.6% heroin.

On April 1, 1986, Davis went to Mercedes and negotiated a purchase of three ounces of heroin. Davis and Agent Milton returned to the bar the next day and paid Jordan $2,700 for a bag containing 75.50 grams of 2.5% heroin. A month later, on May 2, Davis and Agent Milton went back to Mercedes. They informed Mr. Beverly that they were there to buy three ounces of heroin. Agent Milton ultimately purchased 75.95 grams of 3.4% heroin from Jordan for $2,700. Davis returned to Mercedes on June 24 and asked Mr. Beverly to contact Willie Jordan. Mr. Beverly made several phone calls from the private line behind the bar. When Jordan arrived, he had a private conversation with Mr. Beverly and then told Davis that the package he had ordered was ready. The next day, on June 25, Davis and Agent Milton went to the bar together and purchased a bag of heroin from Jordan for $1,800. Laboratory tests showed that the bag contained 51.28 grams of 2.7% heroin. This was the last purchase from Jordan and Mr. Beverly, although both Davis and Agent Milton attempted to arrange more transactions.

b. Betty McNulty

At the time Johnny Davis began working for the DEA, he had known Ms. McNulty for more than fifteen years.

On August 6, 1986, Davis met with Ms. McNulty at the offices of Blacom Corporation, a company controlled by Alex Beverly, and told her that he had a friend interested in buying half an ounce of cocaine at a good price. Ms. McNulty responded that the price would be $900. On August 11, Davis placed several telephone calls to Ms. McNulty that were recorded from the DEA offices. During the first call, Ms. McNulty indicated that she was having trouble getting the cocaine from Willie Jordan but would continue to try. In the second call, Ms. McNulty initially expressed anger with Davis because she believed that he had spoken poorly of her to his wife the night before, and suggested that she might not set up the transaction. After Davis explained that she had misunderstood, Ms. McNulty apparently calmed down and returned to the topic of the cocaine sale. She informed him that Jordan was not home and told him to call back later. She also asked Davis whether he wanted the cocaine "[a]ny special way." Govt. Ex. T-3b at 5. He said that he wanted it in rock form, but Ms. McNulty advised him that "when you get it like that ya get less." *Id.* She explained that she previously had obtained cocaine for a friend in powder form at a better price and a larger quantity than in rock form. *Id.*[6] On the morning of August 12, Davis placed another recorded telephone call to Ms. McNulty. He then was fitted with a body recorder and proceeded to Ms. McNulty's home. Davis counted out $900 and gave it to Ms. McNulty, who recounted the money and then handed him a clear plastic bag filled with white powder. Ms. McNulty commented that she had obtained the cocaine from Willie Jordan. Laboratory tests revealed that the bag contained 13.05 grams of 90% pure cocaine.

[6] Ms. McNulty actually stated that "they gave [the friend for whom she obtained the cocaine] a nice play. . . . [T]hey didn't specify in the rock form and it was ya know, over what they had." Govt. Ex. T-3b at 5. In drug parlance "nice play" means that the price is decreased somewhat and "over" means that the buyer receives slightly more than he paid for. Tr. at 326-27.

Two weeks later, on August 27, Davis purchased a second bag of cocaine from Ms. McNulty. On this occasion, Davis met Ms. McNulty at the Blacom offices. He counted out the money he had brought and, after Ms. McNulty had recounted it, he received a clear plastic bag containing 27.70 grams of 89% pure cocaine. Ms. McNulty wrapped up the plastic bag in several magazines, placed the package in a shopping bag, and warned Davis to get off the street quickly. She also demonstrated how he should carry the bag so that no one would think it contained drugs or anything else of value.

2. Other drug-related evidence

During the investigation of this case, DEA agents searched an apartment located at 5436 West Division Street in Chicago. The telephone at that address was listed in George Brown's name. Pursuant to a search warrant, agents seized documents and other items. Several of the documents bore Mr. Brown's name and the 5436 West Division address, including a gas bill, a real estate tax bill, and a business card for Wesley's Drive-In. The agents also recovered weapons, money, narcotics, and drug paraphernalia, including: two automatic guns and thirty-one rounds of ammunition; three knives; $1,400 in cash; quantities of white and brown cocaine; a triple beam scale; a steel pot containing a razor blade, glassine envelopes, and cutting powder; a blender, sifter, and spoon, each of which contained heroin with traces of cocaine and quinine.

A DEA expert testified that the equipment used for cutting drugs includes blenders and sifters, which are used to break up firmly packed cocaine and mix it with other substances, and razor blades, which are used to divide up quantities of drugs for distribution. In addition, the expert testified that the type of scale recovered from 5436 West Division would be used by a drug dealer rather than a user, and that drug dealers tend to be armed with the type of guns and knives recovered by the government to protect both themselves and their narcotics.

3. Financial considerations

a. Blacom Corporation

i.

Blacom, a construction company, was incorporated by Perry Beverly on January 25, 1985. Perry, who is Alex Beverly's brother, became Blacom's sole shareholder, director, president, secretary, and treasurer upon incorporation. He was twenty-six years old at the time and, although he had some experience in construction, he had no prior business experience. Corporate records reveal that 1,000 shares of stock were issued to him at a total value of $1,000. However, Perry never invested any money in Blacom. During Perry's tenure with the company, Blacom purchased property and opened food and liquor stores. Although Perry was in charge of the whole enterprise, he had no idea how much revenue Blacom received for its various construction jobs or in what form payment was made, nor did he know where the money came from to open the stores or purchase property. He resigned from Blacom in August of 1985 and transferred the company, together with his shares, to Betty McNulty. Ms. McNulty received an additional 29,000 shares when she took over although, like Perry Beverly, she never made any capital contributions.

A Blacom corporate meeting was held in January of 1986. The meeting was attended by Eclorise Scott, William White, Yvonne Elliott, Joe Gibbs, Betty McNulty, Alex Beverly, and Larry Saska, an attorney who represented both Blacom and Mr. Beverly. In that meeting, Mr. Beverly announced that Scott, White, Elliott, and Gibbs would become ten percent shareholders of the company and Ms. McNulty would become a sixty percent shareholder. None of these parties purchased their shares or made other investments. Mr. Beverly also suggested who would become officers of Blacom. Although Mr. Beverly was not a record shareholder or a Blacom officer, all of his suggestions were adopted without discussion.

A bookkeeper from Statewide Accounting prepared Blacom's corporate and sales tax returns for 1985 and 1986. She testified that she realized in early 1986 that Blacom's expenditures far exceeded its income. By examining receipts from Blacom's liquor purchases, it became clear that, because the company had made payments to distributors in cash, there was extra cash on hand that did not go through the bank and was not reflected in corporate accounts. William White, one of the participants in Blacom's January 1986 meeting, suggested that Statewide mark up the bank deposits to account for any discrepancy. Statewide, which also worked for George Brown, was informed that Mr. Brown owned Wesley's Drive-In and that all work concerning his account was to be picked up at the Blacom offices. However, the fire insurance for Wesley's Drive-In was in Alex Beverly's name.

ii.

Blacom had extensive holdings by the time Ms. McNulty took over in 1985. In 1984, Mr. Beverly had purchased the real estate located at 5436-38 West Division Street in Chicago. Larry Saska paid the $40,000 balance due at the closing with checks and cash given to him by George Brown. Mr. Beverly instructed Saska to transfer the property to a land trust, the beneficiary of which was Diane Griffin, but later directed Saska to place the property into a trust having Blacom as its beneficiary. Because less than $100 consideration was paid for each of these transfers, they were tax exempt. In September of 1984, Mr. Beverly paid $8,000 in cash for the property at 1811 South Harding, the house in which Betty McNulty later lived. Ms. McNulty was the named grantee in the 1984 deed, although Mr. Beverly directed Saska to transfer the property into Diane Griffin's trust and then into Blacom's trust. Mr. Beverly also had the properties located at 1812 South Millard and 1801-07 South Lawndale placed originally in Diane Griffin's trust and later transferred to Blacom's trust.

In March of 1985, Mr. Beverly became the beneficiary of a trust that held property on West Ogden Avenue, the location of Blacom's offices. In July of that year, he transferred this interest to Blacom for no consideration. His beneficial interest in a building which housed one of the Blacom food and liquor stores similarly was transferred to Blacom in July of 1985 for no consideration. Finally, the property housing Somons Lounge was acquired by Blacom in 1985. Mr. Beverly never held a property interest in this particular land, although he was present during the contract negotiations for its purchase. Mr. Beverly also was involved in several rental properties. In 1984, he negotiated an $800 monthly rental for what became the Mercedes bar. The lease identified Ms. McNulty as lessee and Mr. Beverly as guarantor. Mr. Beverly also negotiated an agreement with the owner of a liquor and grocery store whereby Mr. Beverly would purchase the store's assets for $25,000 and rent the building for $3,500 per month. The original lease named Blacom as the lessee, but the lease later was changed at Mr. Beverly's direction to name Betty McNulty as the lessee.

In addition to his other connections with these properties, Mr. Beverly arranged for essentially complete renovations of three separate properties, including Somons Lounge. The gutted building that eventually housed Somons had to be reduced to bare brick and started over. Mr. Beverly paid the workers on these projects in cash and also paid for the construction materials.

b. Betty McNulty

Ms. McNulty and Mr. Beverly lived together from the late 1970s through at least 1985. As described above, Mr. Beverly placed in Ms. McNulty's name the leases for two rental properties and the deed for the house they shared. Ms. McNulty, accompanied by Mr. Beverly, purchased the property at 1812 South Millard for $5,000 to 6,000 cash. She became the titleholder of a late-model Mercedes Benz purchased and driven by Mr. Beverly. She also received

public assistance from at least May 1982 to February 1984. Bank records from 1984-86 reveal that the minimum amount of checks drawn on her personal checking account were: $27,441.92 in 1984; $65,981.67 in 1985; $57,071.94 during the first eleven months of 1986. During this same three-year period, Ms. McNulty wrote $33,484.09 in checks payable to Mr. Beverly's American Express account. All payments on Mr. Beverly's American Express card were made from Ms. McNulty's bank account.

Betty McNulty's 1985 federal tax returns[7] revealed that she held Somons and one of the Blacom food and liquor stores as sole proprietorships. In 1986, she reported $22,000 in income from Blacom, although Blacom's corporate tax return for the fiscal year ending May 1986 showed that no company officers had received any compensation.

c. Diane Griffin

For at least part of 1986, Ms. Griffin and Mr. Beverly shared an apartment located above Tit's lounge. The building originally was owned by Burl Price, who sold it to Haley Rainey. In 1980 or 1981, Rainey told Price that he wanted to pay off the debt because he was selling the building to someone else. When Price received a notice of delinquent taxes on the property several months later, he called Alex Beverly, who picked up the notice and said he would take care of it. On August 30, 1983, Ms. Griffin obtained the beneficial interest in a land trust containing both this property and the adjoining building, which houses one of the Blacom food and liquor stores. Ms. Griffin received public assistance from at least 1978 until October of 1984, when her benefits were cancelled because the Illinois Department of Public Aid (IDPA) could not locate her. In September of 1983, several weeks after receiving the interest in the land trust discussed above, Ms. Griffin signed an IDPA document indicating that she had no income or resources.

[7] Ms. McNulty did not file returns for the years 1981-84.

Ms. Griffin did not file tax returns in 1981-82 or 1986, although Mr. Beverly told Suarez in March of 1986 that he had purchased Tit's for her. The government also introduced other evidence concerning Ms. Griffin's assets. For example, in September 1985, Mr. Beverly purchased a $35,000 Jaguar for Ms. Griffin. The Jaguar, which carried the license plate "Alex, Jr.," was purchased in Ms. Griffin's name but paid for by Mr. Beverly, primarily in cash.[8] Bank records reveal that most of the checks drawn on an account they held jointly were for business expenses such as liquor purchases and electric bills. The minimum amount of checks drawn on the account were: $1,975.43 in 1983; $81,354.80 in 1984; $47,460.65 in 1985; $7,847.08 in 1986.

d. Alex Beverly

According to Perry Beverly, the only "regular" job Alex Beverly held from 1980-86 was as a delivery man for some period in 1982 or 1983.[9] Robert Beverly testified that his brother Alex did some construction work in 1985 or 1986. Ronald Smith, who identified Mr. Beverly as "one of [his] best friends," knew only that Mr. Beverly did some construction work in the early 1980s. Tr. at 1725. However, in addition to the extensive expenditures and financial transactions noted above, Alex Beverly spent money on clothes and other items. For example, in November 1985, he purchased a fur coat for a cash price of $1,395. He bought a second fur jacket in December, monogrammed

[8] An initial down payment of $500 in cash was made on September 16, 1985. A $7,000 payment was made on September 23, 1985 by check, followed by cash payments of $8,000 and $7,000 on September 30 and October 1, respectively. On October 2, 1985, another cash payment of $6,000 was made, and the final payment of $7,186 was made in cash on the next day, October 3.

[9] When Perry Beverly testified before the grand jury, he stated that he had never known his brother to have legitimate employment; he did not mention that his brother had worked as a delivery man.

"Mr. Beverly" in the lining, for a cash price of $3,995. Suarez warned Mr. Beverly to be careful with the way he handled his money, but Mr. Beverly responded that he was "licensed under his women and some of his apartments to do that kind of thing and keep it isolated from the business." Tr. at 853. Although Mr. Beverly did not file tax returns from 1982-86, the IRS was able to estimate, based on the evidence regarding his drug transactions, that his adjusted gross income in 1986 was $224,500.

4. Suarez letter

In approximately September of 1987, after the original indictment had been returned against the defendants, Peter Suarez wrote a letter (the Suarez letter) to the Assistant United States Attorney (AUSA) who tried this case. On June 2, 1988, the AUSA notified defense counsel of the letter's existence, but informed counsel that she could not locate it. She recalled that she had given the letter to one of the DEA agents involved in the investigation, but in preparing for trial they were unable to locate either the original letter or a copy. She believed that the letter was approximately three handwritten pages. The AUSA summarized her recollection of the letter as follows:

> The salutation on the letter was "Dear Andrea". Suarez went on to say that he believed he could address me by my first name because he felt that we were "working for the same team". Suarez reiterated his desire to cooperate with the government and added "I want to do everything I can to help you convict Beverly". Suarez then expressed some concerns about his safety at the institution where he was housed. I do not remember the specifics of those concerns. Suarez closed the letter with a request that he be moved to a different facility.

Appellants' Consolidated Br. at App. 5. At trial, Suarez was unable to add any further detail to the AUSA's recollections.

On June 9, 1988, the day the trial began, Alex Beverly and George Brown moved to bar Suarez' testimony based on the government's failure to disclose the letter. They also served a trial subpoena upon the AUSA to appear as a witness on behalf of Mr. Beverly. The government moved to quash. The court denied the motion to bar and granted the government's motion to quash. The defendants subsequently moved to strike Suarez' testimony or, in the alternative, for a hearing "to ascertain the nature of the Government's misconduct in losing this important evidence, and to determine appropriate sanctions." R.253 at 1. Following oral argument by the defendants and the government, the district court denied the alternative motions.

B. *The Trial*

At the trial, which extended over a five week period, the government established the facts set forth above. The government also introduced various charts summarizing information obtained from pen registers attached in 1986.[10] The director of technical operations for the Chicago office of the DEA testified that he had supervised the installation of at least 50 pen registers and had personally installed over 500 such devices. Having been transferred to the Chicago office in 1986, he could not testify from personal knowledge that the pen registers used in this case were connected properly. However, he testified that pen register installation procedures are uniform throughout the United States and that, in his experience, the DEA had never attached a pen register to the wrong telephone number. The records generated in this case revealed that, in the course of a three week period in December 1986, forty-nine calls were placed from the Mercedes bar to Wesley's Drive-In and seven calls were made from the bar to George Brown's address.

[10] A pen register is an electronic device that registers all telephone numbers dialed from the telephone line to which the device is connected. Tr. at 2442.

After the trial began, the defendants learned that telephone calls recorded in a separate Federal Bureau of Investigation (FBI) case might involve Mr. Beverly. Mr. Beverly's attorney requested that he be given a continuance to listen to the tapes. The district court determined that the tapes were not discoverable and denied the request. At trial, Mr. Beverly presented evidence that he had made money gambling. Hurley Teague testified that he built a dice table for Mr. Beverly in early 1986. That table and another dice table were used at Somons Lounge.[11] Teague stated that he helped wire the second table and install a magnetic coil in its false bottom. He also testified that he placed a large magnet in a stool used with the table he had built and observed that when the stool was placed close to the table, the dice would come up as seven's or eleven's. Teague stated that he observed Mr. Beverly and others playing dice, once at the table he had constructed and once at the second table. On at least one of those occasions, there was "a lot of money" on the table. Tr. at 2824.

Tim Robinson also testified about Mr. Beverly's gambling background. Robinson stated that he and Mr. Beverly operated a gambling house on Sangamon Street from late 1979 until 1984. As the housemen, they took ten percent of all bets. Most of the gambling took place at the dice tables, although card games also were played. After the police closed down the house, Robinson "wrote" horses and the lottery for Mr. Beverly until 1986.[12] Mr. Beverly received seventy-five cents of every dollar bet and paid

[11] The second dice table replaced the table built by Hurley Teague. Teague testified that he moved the original table from Somons to the Blacom warehouse on West Ogden when the second table arrived. However, no dice tables like those described by Teague were discovered when Somons and the Blacom properties were searched in July of 1987 as part of the investigation in this case.

[12] Robinson wrote up bets as they were placed and collected the bet money.

the winners; Robinson received the remaining twenty-five cents but did not have any pay-off responsibilities. Robinson testified that his monthly income from the Sangamon business was $15,000-20,000 and that his net income for those 4 to 5 years was well over $100,000 per year. He stated that, from 1984-86, when he wrote bets, he made at least $300,000 per year. Gary Hubbard also testified that he had gambled with Mr. Beverly since 1969. He recalled that Mr. Beverly won approximately $25,000 one night in 1985 and approximately $30,000-35,000 one day in May 1987.

Finally, Mr. Beverly called Dr. Chester Layne, Mr. Beverly's dentist and a former cocaine addict. The government objected to the testimony defense counsel sought to elicit from Dr. Layne. According to the defendant's offer of proof, Dr. Layne would have testified that Mr. Beverly counseled him on his cocaine addiction and that he sought professional help as a result. Dr. Layne also would have testified that he never saw Mr. Beverly buy or sell cocaine, and that although drugs were sold outside of Somons, Mr. Beverly was not the seller. The district court excluded this testimony on hearsay and relevance grounds.

Betty McNulty presented two witnesses to support her entrapment defense. Ms. McNulty's mother testified that in August 1986, Johnny Davis, the DEA informant, called Ms. McNulty's home as often as four or five times each day. Yvonne Elliott, Blacom's bookkeeper, also testified that, in August 1986, Davis frequently telephoned Ms. McNulty at the company's offices and came by in person to see her several times.

Diane Griffin called three women who testified that they were employed by Tit's lounge and knew Mr. Beverly. They all stated that Mr. Beverly never told them how to do their jobs and that he paid for his drinks like the other customers. The defendants[13] also presented testimony from James Ragan, the DEA agent who interviewed Peter Suarez in Las Vegas on January 7, 1987. Agent Ragan acknowledged that his report from the first interview with Suarez did not mention several points on which Suarez testified at trial.

[13] George Brown did not call any witnesses specifically on his behalf.

C. *Jury Instructions*

The district court instructed the jury on July 13, 1988. With regard to the continuing criminal enterprise charge against Alex Beverly, the court instructed the jury not to consider Diane Griffin, Johnny Davis, or Agent Milton in determining whether Mr. Beverly acted in concert with five or more people. The court denied Mr. Beverly's request to include Peter Suarez in the list of persons the jury could not consider. The court also denied Mr. Beverly's request that the jury be required to return special verdicts identifying the five people found to have participated in the continuing criminal enterprise.

During the trial, Ms. Griffin moved for severance, which the district court denied. She claimed that the government's only theory was her alleged participation in a conspiracy to evade taxes because there was no proof that she knew Mr. Beverly was a drug dealer. The government maintained that such proof was not necessary and that the jury could return a guilty verdict under either the drug or tax arm of the fraud conspiracy. Ms. Griffin subsequently objected to the government's proposed conspiracy instruction on the ground that it did not differentiate between the drug and tax objectives. She submitted an alternate instruction that would have required the jury to (1) find that she knew that the object of the conspiracy was to impede the IRS in ascertaining Mr. Beverly's taxes, and (2) identify, via special interrogatories, the objective of which the jury believed she had knowledge. The district court denied both her jury instruction and requested special interrogatories. After deliberating, the jury returned guilty verdicts on all but three counts.[14]

[14] Mr. Beverly and Mr. Brown each were acquitted of three counts of possession of cocaine with the intent to distribute.

D. *Sentencing*

Following a September 23, 1988 sentencing hearing, the district court set forth its factual conclusions and imposed sentence. Based on their respective convictions, Alex Beverly received a 35 year sentence, lifetime special parole, and a $100,000 fine; George Brown was sentenced to 20 years imprisonment and lifetime special parole; Betty McNulty received a 3 year sentence followed by 10 years of special parole; Diane Griffin received a suspended sentence and was placed on probation for 5 years on the condition that she reside and participate in the Salvation Army's work release program for the first 6 months of probation, obtain and maintain employment, and perform 500 hours of community service.

With specific regard to George Brown, the only defendant who challenges his sentence, the court determined that:

> [b]ased on the evidence in this case, it's clear to the Court you were second in command. You've been involved in this enterprise since at least 1979 and through 1987. You ran at least one of the smoke houses. You were the one that brought the cash and retrieved large quantities of narcotics on a regular and frequent basis. There were numerous firearms found in your apartment.

Sentencing Tr. at 49.[15]

[15] The government had argued at the sentencing hearing that "Mr. Brown wasn't involved in a small level. He wasn't a mope who just delivered. He was up there at the top. And because of that, Judge, and because of the fact that he has a prior record and because of the fact that there really is—are no really mitigating factors for Mr. Brown." Sentencing Tr. at 20.

II

ANALYSIS

All the defendants challenge several decisions made by the district court. Each defendant also raises additional issues on appeal. We shall analyze the combined claims first, then address each defendant's separate contentions.

A. *Consolidated Arguments*

1. Peter Suarez' testimony

Alex Beverly and George Brown challenge the district court's denial of their motion to strike Suarez' testimony.[16] As we have noted previously, *see supra* p. 15, a week before trial, the Assistant United States Attorney disclosed to defense counsel that she had received a letter from Suarez that offered to "do everything I can" to assist in the conviction of Mr. Beverly. The letter had been lost and a search had failed to uncover it. Mr. Beverly and Mr. Brown contend that the government failed promptly to disclose the Suarez letter and that the government's subsequent loss or destruction of that letter deprived them of due process.

During the discovery process, the government must disclose evidence favorable to the defendant that, if suppressed, would deprive the accused of a fair trial. *Brady v. Maryland*, 373 U.S. 83, 86-87 (1963); *see United States v. Bagley*, 473 U.S. 667, 674-75 (1985). This duty extends both to exculpatory evidence and to evidence that might be used to impeach the government's witnesses. *Bagley*, 473 U.S. at 676; *Giglio v. United States*, 405 U.S. 150, 153-54 (1972). The duty stems from the fact that nondisclosure of such evidence violates due process. *Bagley*, 473 U.S. at 675; *Brady*, 373 U.S. at 86. The government does

[16] The district court earlier had denied the defendants' motion to bar Suarez' testimony. We affirm that denial for the same reasons we uphold denial of the motion to strike.

not dispute its obligation to disclose the existence of the Suarez letter to the defendants.

We do not believe that the defendants were denied due process of law by the timing of the disclosure. In *United States v. Allain*, 671 F.2d 248, 254-55 (7th Cir. 1982), where the defendant raised a due process issue similar to the claim in this case, the court noted that

> the standard to be applied in determining whether the delay in disclosure violates due process is whether the delay prevented defendant from receiving a fair trial. "As long as ultimate disclosure is made before it is too late for the defendant[ ] to make use of any benefits of the evidence, Due Process is satisfied." *United States v. Ziperstein*, 601 F.2d 281, 291 (7th Cir. 1979), *cert. denied*, 444 U.S. 1031, 100 S. Ct. 701, 62 L.Ed.2d 667 (1980).

Id. at 255 (citation omitted); *see also United States v. Weaver*, 882 F.2d 1128, 1141 (7th Cir.) (collecting cases), *cert. denied*, 110 S. Ct. 415 (1989). Here, the government notified defense counsel a week before trial of the existence of the Suarez letter and its contents.[17] The defendants have suggested no particular prejudice in the preparation of their defense. Indeed, the record reveals that the defense, in vigorous cross-examination of Suarez, was able to make good use of the impeaching statements admittedly contained in the letter. Finally, because there is no evidence that the government intentionally destroyed

[17] We have noted that " '[t]here is nothing in *Brady* or [*United States v. Agurs*, 427 U.S. 97 (1976),] to require that such disclosures be made before trial . . . .' " *United States v. Allain*, 671 F.2d 248, 255 (7th Cir. 1982) (quoting *United States v. McPartlin*, 595 F.2d 1321, 1346 (7th Cir.), *cert. denied*, 444 U.S. 833 (1979)); *see also United States v. Zambrana*, 841 F.2d 1320, 1340 (7th Cir. 1988) (government's failure to disclose exculpatory evidence until just prior to commencement of trial did not violate *Brady*); *Allain*, 671 F.2d at 254-55 (no *Brady* violation where government disclosed evidence favorable to defense on day before trial began).

the letter or engaged in any misconduct, we shall not disturb the district court's finding that the government did not act in bad faith. Thus, the fact that the Suarez letter was lost does not alter the resolution of this issue. *See United States v. Zambrana*, 841 F.2d 1320, 1341-42 (7th Cir. 1988) (lost or destroyed evidence does not violate due process absent " 'official animus' " or " 'conscious effort to suppress exculpatory evidence' ") (quoting *California v. Trombetta*, 467 U.S. 479, 488 (1984)).

We also do not believe the district court abused its discretion in denying the defendants' request for a hearing, which was brought as an alternative to their motion to strike. An evidentiary hearing was required only if the defense had presented specific facts raising a significant doubt about the propriety of the government's conduct. *See United States v. Sophie*, 900 F.2d 1064, 1071 (7th Cir. 1990) (defendant claimed government acted in bad faith by violating alleged plea agreement; denial of evidentiary hearing upheld); *United States v. Valona*, 834 F.2d 1334, 1340 (7th Cir. 1987) (alleged misconduct for preindictment delay; no error to deny hearing). In this case, the defendants suggested that there had been government misconduct but offered nothing more in support of that claim than the fact that the letter had been in the government's possession and later could not be found. However, "this alone is insufficient to establish bad faith." *Zambrana*, 841 F.2d at 1343. Because the defendants failed to present sufficient evidence of government misconduct, the district court was not required to conduct a hearing on the issue.

2. Jury deliberations

a. defendants' motion for mistrial

The jury began deliberating on the morning of July 14, 1988. On the second day of deliberations, the jury wrote three notes to the court. At 1 p.m. the jury asked whether a defendant who was acquitted on all remaining counts could be found guilty on count one. Approximate-

ly forty-five minutes later, the jury asked how to report a vote that is not unanimous, "[f]or instance a count of eleven guilty [and] 1 not guilty." R.302. While the court and counsel discussed the second note, the court security officer stated that the jurors "feel very strongly that by 2:30 they're going to have a verdict." Tr. at 3697. The court and all counsel agreed at that point that the *Silvern* instruction could be reread to the jury.[18] However, it was not read at that time. A few minutes later the court received another note from the marshal stating as follows: "We have a verdict. Also, the jury, on a separate sheet, listed those counts where they were 11-1. This listing is for your eyes. Do you want that list now?" R.302. Yet, another note, the final note, written at 3:15 p.m., stated, "We cannot reach a guilty or not guilty decision on the attached list of counts. Going beyond this point might involve intimidation." R.302. Following receipt of the last

[18] The *Silvern* instruction, which was read to the jury as part of the formal jury instructions, is derived from *United States v. Silvern*, 484 F.2d 879, 883 (7th Cir. 1973) (en banc). The district court in this case gave the instruction as follows:

> The verdict here must represent the considered judgment of each juror. Your verdict, whether it be guilty or not guilty[,] must be unanimous. You should make every reasonable effort to reach a verdict. In doing so you should consult with one another, express your own views and listen to the opinions of your fellow jurors. Discuss your differences with an open mind. Do not hesitate to re-examine your own views and change your opinion if you come to believe it is wrong.
>
> But you should not surrender your honest beliefs about the weight or effect of evidence solely because of the opinions of your fellow jurors or for the purpose of returning a unanimous verdict. The 12 of you should give fair and equal consideration to all of the evidence and deliberate with the goal of reaching an agreement which is consistent with the individual judgment of each juror. You are impartial judges of the facts. Your sole interest is to determine whether the government has proved its case beyond a reasonable doubt.

Tr. at 3715; *see United States v. Byrski*, 854 F.2d 955, 958 n.4 (7th Cir. 1988).

note, the court, over defense counsel's objection, reread the *Silvern* instruction to the jury at approximately 4:15 p.m. The jury continued to deliberate until 5:00 p.m., then resumed deliberations and reached a verdict on Monday, July 18.

Based on the jury's note that "[g]oing beyond this point might involve intimidation," R.302, the defendants moved for a mistrial. They now challenge the district court's denial of this motion. They contend that, once the court knew that the jury had reached a verdict on some counts but was split on others, the court was required to take the verdicts and declare the jury partially hung. For the following reasons, we believe the district court was correct in denying defendants' motion.

The district court has broad discretion with regard to declaring mistrials. Our review is limited to whether the denial of a motion for mistrial constituted an abuse of the district court's discretion. *See United States v. D'Antonio*, 801 F.2d 979, 983 (7th Cir. 1986); *see also United States v. Perez*, 870 F.2d 1222, 1227 (7th Cir.), *cert. denied*, 110 S. Ct. 136 (1989). In *United States v. Kwiat*, 817 F.2d 440 (7th Cir.), *cert. denied*, 484 U.S. 924 (1987), the trial involved multiple defendants and lasted for nine days. After only seven hours of deliberation, the jury notified the court that it could not reach a verdict on some of the charges and thought further deliberations would be " 'fruitless.' " *Id.* at 446. This court determined that, because such circumstances do "not compel a district court to grant a mistrial," it was not an abuse of discretion for the district court to instruct the jury to continue deliberating. *Id.*

Similarly, under " 'all the circumstances of [this] case,' " *D'Antonio*, 801 F.2d at 983 (quoting *United States v. Allen*, 797 F.2d 1395, 1400 (7th Cir.), *cert. denied*, 479 U.S. 856 (1986)), a mistrial was not compelled by the fact that the jury thought it was deadlocked. Here, the jury had deliberated for less than two days—approximately twelve hours—following a trial that had extended over five weeks

and involved six defendants and twenty-three counts. The district court "has great discretion to determine how long deliberations should continue." *Kwiat*, 817 F.2d at 446. That discretion was not abused in this case. We therefore shall not disturb the court's refusal to declare a mistrial.

b. the *Silvern* instruction

Finally, the defendants assert that the district court erred by rereading the *Silvern* instruction, particularly in light of the fact that the court knew the jury was split eleven to one on some counts. We rejected this same argument in *United States v. Gabriel*, 597 F.2d 95 (7th Cir.), *cert. denied*, 444 U.S. 858 (1979). There, we concluded that the district court did not abuse its discretion by rereading the *Silvern* charge when the jury indicated that it was deadlocked after less than three hours of deliberation following a six day trial. In *Gabriel*, as here, the district court knew that the jury was split eleven to one against the defendant. *Id.* at 100. Similarly, in *Kwiat*, where the jury thought it was deadlocked after less than three hours of deliberation following a nine day trial, the district court's decision to reread the *Silvern* charge was upheld as within that court's sound discretion. 817 F.2d at 446; *see also United States v. Byrski*, 854 F.2d 955, 962 n.11 (7th Cir. 1988) (no abuse of discretion where court repeated *Silvern* charge *twice*).[19] Under the facts of this case, we conclude that the district court did not abuse its discretion by giving the *Silvern* charge. The instruction read here was "per-

[19] *Cf. United States v. D'Antonio*, 801 F.2d 979, 983 (7th Cir. 1986) (jury indicated inability to reach a verdict after only three hours of deliberation; no abuse of discretion where court sent jury a note ordering further deliberations rather than rereading *Silvern* instruction). We reject the defendants' claim to the extent that it attacks the district court's decision to *read* the *Silvern* charge rather than respond to the jury in writing. *See United States v. Cheek*, 882 F.2d 1263, 1268 (7th Cir. 1989) (character of additional instructions rests within district court's sound discretion), *cert. granted on other grounds*, 110 S. Ct. 1108 (1990).

fectly content-neutral and carried no plausible potential for coercing 'the jury to surrender their honest opinions for the mere purpose of returning a verdict.' " *D'Antonio*, 801 F.2d at 983-84 (quoting *United States v. Thibodeaux*, 758 F.2d 199, 203 (7th Cir. 1985)).

B. *Individual Appeals*

1. Alex Beverly

a. continuing criminal enterprise charge

Mr. Beverly first alleges error in the jury instructions. He claims that he did not organize, supervise, or manage Peter Suarez within the meaning of the continuing criminal enterprise (CCE) statute, 21 U.S.C. § 848.[20] He therefore argues that the jury should have been instructed that Suarez could not be considered for purposes of the CCE count. Mr. Beverly claims only that he did not organize, supervise, or manage Suarez; he does not deny that he occupied such a position with respect to at least five people. Therefore, this court's decision in *United States v. Holguin*, 868 F.2d 201, 202-04 (7th Cir.), *cert. denied*, 110 S. Ct. 97 (1989), disposes of Mr. Beverly's claim. Based on our review of the record, we determine that there was

[20] To engage in a CCE, the defendant must occupy "a position of organizer, a supervisory position, or any other position of management" with respect to at least five other persons. 21 U.S.C. § 848. To prove a violation of § 848, the government must show:

> (1) a predicate offense violating a specified drug law (2) as part of a "continuing series" of drug violations (3) that occurred while the defendant was acting in concert with five or more people (4) to whom the defendant occupied the position of an organizer or manager and from which series the defendant (5) obtained substantial income or resources.

United States v. Sophie, 900 F.2d 1064, 1077 (7th Cir. 1990) (quoting *United States v. Markowski*, 772 F.2d 358, 360-61 (7th Cir. 1985), *cert. denied*, 475 U.S. 1018 (1986)). Mr. Beverly challenges the third and fourth elements. The court did not identify who *could* be considered for purposes of this count, but instructed the jury not to consider Diane Griffin, Johnny Davis, or Officer Milton.

sufficient evidence presented at trial to establish that he in fact organized, supervised, or managed at least five individuals.[21] "That determination ends our inquiry." *Id.* at 204. It is irrelevant whether the evidence was insufficient to establish that Mr. Beverly acted in concert with Suarez. *See id.* at 203.

Mr. Beverly also attacks the district court's denial of his request that the jury be required, by the use of special interrogatories, to identify specifically the persons it found Mr. Beverly had organized, supervised, or managed. However, it is well settled that the law "does not make the identity of the five important." *United States v. Markowski*, 772 F.2d 358, 364 (7th Cir. 1985), *cert. denied*, 475 U.S. 1018 (1986). Therefore, a CCE conviction will stand where those who were organized, supervised, or managed are unidentified. *See id.* ("The CCE statute is directed against all enterprises of a certain size; the identity of those involved is irrelevant."); *see also Holguin*, 868 F.2d at 203 & n.5 (government not required to prove the identity of five or more persons organized by defendant); *United States v. Moya-Gomez*, 860 F.2d 706, 747 (7th Cir. 1988) (quoting *Markowski*), *cert. denied*, 109 S. Ct. 3221 (1989). Because the evidence was sufficient to establish that Mr. Beverly acted in concert with at least five people, we affirm the CCE conviction.

b. district court rulings

Mr. Beverly challenges three evidentiary rulings made during the trial. Our review of the district court's rulings is limited to whether the court abused its discretion. *See United States v. Nedza*, 880 F.2d 896, 903 (7th Cir.), *cert. denied*, 110 S. Ct. 334 (1989). Mr. Beverly carries "a heavy burden in challenging the trial court's eviden-

[21] Such persons include, at least, Betty McNulty; George Brown; Willie Jordan; Charles Avant; and Mary Pugh, the woman who kept at her house the cash Mr. Beverly used to pay for a kilogram of cocaine on October 18, 1986.

tiary rulings on appeal because ' "a reviewing court gives special deference to the evidentiary rulings of the trial court." ' *United States v. Shukitis*, 877 F.2d 1322, 1327 (7th Cir. 1989) (citation omitted)." *United States v. Briscoe*, 896 F.2d 1476, 1489-90 (7th Cir. 1990). We therefore shall uphold such rulings unless the defendant demonstrates that the district court abused its discretion. *Id.* at 490.

Mr. Beverly claims first that the district court erroneously barred the testimony of Dr. Chester Layne. Had he been permitted to take the stand, Dr. Layne would have testified that (1) he sought professional help for his cocaine addiction as a result of Mr. Beverly's counseling, and (2) he never saw Mr. Beverly buy or sell cocaine outside of Somons Lounge. This matter needs little elaboration. As the district court recognized, hearsay problems aside, the evidence simply was not relevant. The testimony would have revealed nothing about Mr. Beverly's activities at Somons. Moreover, Mr. Beverly undoubtedly could have called any number of additional witnesses to testify that they never had purchased cocaine from him. Such proof of an assertion by a negative is inadmissible.[22] Accordingly, the district court did not abuse its discretion by excluding Dr. Layne's testimony.[23]

[22] *See United States v. Troutman*, 814 F.2d 1428, 1454 (10th Cir. 1987) (defendant indicted for extortion of specific company offered evidence that he had not extorted other companies; evidence properly excluded as irrelevant). Moreover, even relevant evidence may be excluded in some instances. *See* Fed. R. Evid. 403. Here, "[t]he relevance of the offered proof to the charges against [the defendant] is so tenuous that the district judge was entitled to conclude that its probative value would be clearly outweighed by its effect in confusing the jury by extending an already very long trial. Fed. R. Evid. 403." *United States v. LaFevour*, 798 F.2d 977, 980 (7th Cir. 1986).

[23] Mr. Beverly's claim also fails to the extent that he argues Dr. Layne's testimony was admissible as character evidence. This argument was not made to the district court and cannot be made now. *See United States v. Nedza*, 880 F.2d 896, 904 (7th Cir.), *cert. de-*

(Footnote continued on following page)

Mr. Beverly next contends that the government failed to show that the DEA properly connected the pen register used to monitor the phone line at Somons Lounge and that the district court therefore improperly introduced evidence obtained through its use. This claim has no merit. The government laid an ample foundation for the introduction of this evidence through the director of technical operations for the Chicago office of the DEA. Although the director personally did not install the device used in this case, he testified that the installation procedure was standardized throughout the United States and that he had never known the DEA to misconnect a pen register. Moreover, the tape printed out by the device indicated that it was in fact connected to the phone line serving Somons Lounge. Accordingly, we conclude that the district court did not abuse its discretion by admitting evidence derived from the pen registers.

In his final challenge to the district court's evidentiary determinations, Mr. Beverly claims that Burl Price improperly was allowed to testify to hearsay statements. Price testified that (1) he sold a building to Haley Rainey under a land contract, (2) when Rainey made the final payment in 1980 or 1981, he told Price that he was selling the building to someone else, and (3) when Price received a notice of delinquent taxes on the property, he called Alex Beverly, who picked up the notice and said he would take care of it. Mr. Beverly argues that Price's second statement constituted impermissible hearsay. Although this testimony encompasses out of court statements between Price and Rainey, the district court determined that those statements were not offered to prove the truth

[23] *continued*
nied, 110 S. Ct. 334 (1989). In addition, Mr. Beverly's character was not an essential element in this case; character evidence may not be proved by specific instances of conduct, such as Mr. Beverly sought to introduce through Dr. Layne, unless character of a person is "an essential element of a charge, claim or defense." Fed. R. Evid. 405(b).

of the matter asserted. We agree and conclude that the government's use of the testimony—to explain why Price contacted Mr. Beverly about the tax notice—was permissible. *See* Fed. R. Evid. 801(c); ***see also Lee v. McCaughtry***, 892 F.2d 1318, 1324 (7th Cir.) (statements introduced "merely to give the context of the defendant's statements are not hearsay"), *cert. denied*, 110 S. Ct. 3244 (1990). Moreover, the court directed the jury to consider the challenged testimony only as an explanation of Price's subsequent actions and not for the truth of the contents of his conversation with Rainey. Because there is not an "overwhelming probability" that the jury in this case was unable to follow the court's limiting instruction, the jury must be presumed to have followed it. *See Greer v. Miller*, 483 U.S. 756, 766 n.8 (1987); *Lee*, 892 F.2d at 1325.

Mr. Beverly also challenges the denial of several motions made after he discovered that telephone calls recorded in a separate investigation might contain his statements.[24] His attorney asked to hear the tapes and requested a continuance to do so. Following an *in camera* review of the tapes, the district court concluded that they were not discoverable and denied the requests for discovery and for a continuance. Whether to grant such motions rests within the sound discretion of the district court. *See United States v. Dougherty*, 895 F.2d 399, 405 (7th Cir.) (denial of continuance will not be reversed unless district court abused its discretion), *cert. denied*, 110 S. Ct. 3249 (1990); *United States v. Mitchell*, 778 F.2d 1271, 1276 (7th Cir.

[24] Mr. Beverly also claimed that the court abused its discretion in denying a continuance based on the government's failure to meet several deadlines set by the court. The government concedes that not all court orders were met on time, but it objected to continuances because the defense was not harmed by the delays. Indeed, the court denied the motion based on lack of prejudice to the defendants. That conclusion was well within the district court's discretion and is supported by the record. *See United States v. Dougherty*, 895 F.2d 399, 405 (7th Cir.) (continuance properly denied where such denial did not prejudice defendants), *cert. denied*, 110 S. Ct. 3249 (1990).

1985) (reversal warranted only if court abused its discretion in denying discovery). Moreover, to prevail, the defendant must show that "actual prejudice resulted from the denial." *United States v. Turk*, 870 F.2d 1304, 1307 (7th Cir. 1989).

The district court listened to the tapes and determined that they were irrelevant to the case and thus were not discoverable. Accordingly, the court ruled that Mr. Beverly was not entitled to a continuance to examine the tapes. We have reviewed transcripts of the tapes[25] and agree with the district court. The tapes do not contain evidence relevant to either the charges against Mr. Beverly in this case or to his theory of defense. Nor were the tapes discoverable on the basis of Fed. R. Crim. P. 16(a), which requires the government to disclose only "*relevant* written or recorded statements made by the defendant." *Id.* (emphasis supplied). Moreover, our review of the record reveals no prejudice to Mr. Beverly. He claims nevertheless that his decision of whether to testify was impaired by the prospect of cross-examination based on his unknown statements. We disagree; the district court's ruling clearly was based on the tapes' lack of relevance. Statements from them were not available for purposes of cross-examination for the same reason the government was not required to produce them. The district court acted within its discretion on this matter. We therefore affirm the denial of Mr. Beverly's motions.

2. Betty McNulty

a. entrapment

Ms. McNulty first claims that she was not predisposed to commit a drug crime and thus was entrapped by Johnny Davis into obtaining and selling cocaine. As we recently

[25] The district court examined these transcripts, determined that they were accurate, and had them filed under seal as part of the record.

stated in *United States v. Rivera-Espinoza*, No. 89-1688, slip op. at 4 (7th Cir. June 15, 1990):

> [t]he principles surrounding the defense of entrapment are well-established. A defendant who wishes to assert the entrapment defense must produce not only evidence of the government's inducement, but also evidence of his own lack of predisposition. Once this has been accomplished, the burden shifts to the government to prove beyond a reasonable doubt that the defendant was in fact predisposed or that there was not government inducement.

See also United States v. Franco, No. 89-1703, slip op. at 3-4 (7th Cir. Aug. 9, 1990); *United States v. Carrasco*, 887 F.2d 794, 814 (7th Cir. 1989); *United States v. Fusko*, 869 F.2d 1048, 1051 (7th Cir. 1989). At trial, the government convinced the jury that Ms. McNulty was predisposed to sell cocaine. On appeal, she challenges only the evidence on this issue, which is characterized as the " 'principle element' " in the entrapment defense. *Mathews v. United States*, 485 U.S. 58, 63 (1988) (quoting *United States v. Russell*, 411 U.S. 423, 433 (1973)). This element focuses on "whether the defendant was an 'unwary innocent' or, instead, an 'unwary criminal' who readily availed himself of the opportunity to perpetrate the crime." *Id.* (quoting *Russell*, 411 U.S. at 436). In assessing whether a defendant was predisposed to commit a crime, we examine several relevant factors:

> (1) the character and reputation of the defendant, including any previous criminal record; (2) whether the suggestion of the criminal activity was originally made by the government; (3) whether the defendant was engaged in criminal activity for profit; (4) whether the defendant expressed reluctance to commit the offense which was overcome only by repeated government inducement or persuasion; and (5) the nature of the inducement or persuasion applied by the government.

Rivera-Espinoza, slip op. at 4-5 (quoting *United States v. Lazcano*, 881 F.2d 402, 406 (7th Cir. 1989)); *see United States v. Perez-Leon*, 757 F.2d 866, 871 (7th Cir.), *cert. denied*, 474 U.S. 831 (1985). None of these factors, considered alone, are determinative. *Franco*, slip op. at 4; *Perez-Leon*, 757 F.2d at 871. We shall affirm the jury's verdict if any rational trier of fact could have found the requisite predisposition beyond a reasonable doubt. *Rivera-Espinoza*, slip op. at 5.

Examining the evidence adduced at trial in light of these factors, we conclude that a rational juror could have found that Ms. McNulty was predisposed to sell cocaine. The evidence of her character and reputation is inconclusive. She had no prior record, although she admitted to Davis that she previously had obtained drugs for a friend. *See Carrasco*, 887 F.2d at 815. She also illustrated her "sophistication and knowledge of the drug business by stating [to the buyer] that the price . . . was a good one," *Perez-Leon*, 757 F.2d at 872, and demonstrated that she was "not unfamiliar with 'the business' for which" she was convicted, *Rivera-Espinoza*, slip op. at 5, by using terms of art and informing Davis that he would get more for his money if he purchased the cocaine in powder form. With regard to the next factor, it is undisputed that the government, through Davis, approached Ms. McNulty with the request to purchase some cocaine. However, " 'mere solicitation by itself by a government agent is not sufficient to establish the entrapment defense.' " *Id.* (quoting *Perez-Leon*, 757 F.2d at 872). Third, it is unclear from the record whether Ms. McNulty sold cocaine to Davis for profit. In both transactions, Ms. McNulty was very careful to recount the money Davis paid her. The evidence does not reveal that "profit" was ever mentioned, although "we can assume that a person who operates in a chain of cocaine distribution does not do so at a financial loss." *Id.*

The fourth factor is the most important in the predisposition equation. *Id.* at 6; *United States v. Marren*, 890 F.2d 924, 930 (7th Cir. 1989); *Carrasco*, 887 F.2d at 815;

Perez-Leon, 757 F.2d at 871. In this case, it is clear that Ms. McNulty did not exhibit reluctance and was not cajoled into supplying Johnny Davis with cocaine. After he initially requested to purchase some cocaine and said he wanted a good price, Ms. McNulty did not turn him down. To the contrary, she directed him to leave his telephone number and indicated that she could give him a price of $900 for half an ounce of cocaine. This conversation took place in person at the Blacom office, prior to the telephone calls Ms. McNulty claims were used to entrap her. When she indicated several days later that she was having trouble obtaining the cocaine from her source, she did not abandon the project, but expressed her willingness to pursue the transaction. Moreover, she was very solicitous in advising Davis to purchase the cocaine in powder form for the best value and in demonstrating how to carry it to minimize its attraction as something of value.

Finally, the nature of the government's inducement was in dispute. The government contends that Ms. McNulty responded willingly and knowledgeably to Davis' purchase request; the defendant asserts that she obtained and sold the cocaine only after being persuaded by "flagrant coercive tactics." McNulty's Br. at 3. Balanced against the evidence described above, which is favorable to the government's position, is the single occasion on which Ms. McNulty expressed reluctance about the transactions. During the fourth contact with Davis (the second telephone call of August 11, 1986), Ms. McNulty commented that she was not sure she should set up the sale yet. However, the record makes clear that Ms. McNulty made this comment because she was angry with Davis for personal reasons unrelated to the narcotics transaction.[26] We note that "[t]his, like the other factors considered in this five-factor test, was a question of fact which was properly submitted to the jury. The jury, as was its prerogative, chose to believe the testimony presented by the government."

[26] *See supra* p. 8.

Rivera-Espinoza, slip op. at 6 (citation omitted); *see Perez-Leon*, 757 F.2d at 872. Based on our review of the record and in light of the five factors discussed above, we conclude that there was more than enough evidence to support the jury's conclusion that Ms. McNulty was predisposed to obtain and sell cocaine and, as such, was not entrapped.

Ms. McNulty also maintains that the district court abused its discretion in responding to the jury's request for further direction on the entrapment issue. At approximately 2:00 p.m., the jury inquired whether there was any guidance, other than the jury instructions, to help determine whether Betty McNulty had been entrapped. Ms. McNulty retendered her initial instruction on entrapment, which had been rejected in favor of the government's similar proffer, and asked that it be given as a supplemental instruction. Upon the government's objection,[27] Ms. McNulty abandoned her request for additional instruction and instead asked the court to refer the jury to the entrapment instruction originally read; the court did so.

Notwithstanding the fact that she waived any claim on this issue but one predicated on plain error by failing to object to the original entrapment instruction or to the court's decision to refer the jury to that instruction rather than give an additional charge,[28] we determine that her claim is without merit. As we said in *United States v. Cheek*, 882 F.2d 1263, 1268 (7th Cir. 1989), *cert. granted on other grounds*, 110 S. Ct. 1108 (1990), reinstruction is merely *appropriate* "[o]nce it is clear that a jury has difficulties concerning the original instructions." We also made

[27] The government argued that the jury would be confused by additional instruction because the instruction given on entrapment and Ms. McNulty's proffered supplemental instruction were phrased differently but carried the same meaning.

[28] *See United States v. Valencia*, No. 89-1235, slip op. at 14 (7th Cir. July 16, 1990) (court reviews instruction only for plain error where defendant failed to object at trial).

clear that "whether or not to give reinstruction at all is within the discretion of the trial court," as is the "character and extent of supplementary instructions." *Id.*; *see also United States v. Franco*, 874 F.2d 1136, 1143 (7th Cir. 1989); *United States v. Mealy*, 851 F.2d 890, 901-02 (7th Cir. 1988). In this case, the court acted well within its discretion in refusing to read an instruction it already had rejected and in instructing the jury to continue their deliberations in light of the instructions given. We find no reversible error in this decision. *See Mealy*, 851 F.2d at 902 (if original jury charge clearly and correctly states applicable law, district court may properly answer jury's question "by instructing the jury to reread the instructions").

b. conspiracy conviction

Ms. McNulty was convicted of violating 18 U.S.C. § 371, conspiracy to defraud the United States. The crime was charged as a dual-objective conspiracy; the first alleged goal was to impede the IRS in computing taxes (the tax object), and the second was to impede the DEA in ascertaining forfeitable assets (the drug object). On appeal, Ms. McNulty challenges the sufficiency of the evidence with respect to only her knowledge of the tax object of the conspiracy. She also claims that the jury's general verdict is ambiguous and must be reversed.

As will be seen below, a general verdict in a dual-object conspiracy case is problematic under some circumstances. Such an instance is not presented here. Rather, Ms. McNulty's appeal is disposed of by the general rule that "when a jury returns a guilty verdict on an indictment charging several acts in the conjunctive, . . . the verdict stands if the evidence is sufficient with respect to any one of the acts charged." *Turner v. United States*, 396 U.S. 398, 420 (1970); *accord United States v. Bucey*, 876 F.2d 1297, 1312 (7th Cir.), *cert. denied*, 110 S. Ct. 565 (1989). Here, Ms. McNulty's conspiracy conviction will be affirmed because she does not contest that the jury could

convict her under the DEA objective. *See United States v. Soterras*, 770 F.2d 641, 646 (7th Cir. 1985) (citing *United States v. Alvarez*, 735 F.2d 461, 465-66 (11th Cir. 1984) (conviction may be upheld under unchallenged objective where dual-objective conspiracy is charged and evidence is claimed to be insufficient as to only one objective)).

Moreover, Ms. McNulty's claim regarding the general verdict is merely an attack on the sufficiency of the evidence. However, the record amply supports her conviction under the IRS objective. To establish a violation of section 371, the government must show that a defendant "'"agreed to interfere with or obstruct one of [the government's] lawful functions by deceit, craft or trickery, or at least by means that are dishonest."'" *Bucey*, 876 F.2d at 1312 (citations omitted). Where the sufficiency of the evidence is challenged, "[w]e may overturn a verdict only when the record is devoid of any evidence, regardless of how it is weighed, from which a jury could find guilt beyond a reasonable doubt." *United States v. Durrive*, 902 F.2d 1221, 1225 (7th Cir. 1990); *see also United States v. Valencia*, No. 89-1235, slip op. at 7 (7th Cir. July 16, 1990).

The government in this case produced sufficient evidence for the jury reasonably to infer that Ms. McNulty was part of a conspiracy to impede the IRS: on her 1985 tax return, Ms. McNulty claimed Somons as a sole proprietorship. There is no evidence that she was involved with the lounge in any way, although the jury heard evidence that Somons was Mr. Beverly's business. Given the fact that Ms. McNulty had not filed tax returns in the immediately preceding years, the jury was entitled to conclude that she filed the 1985 return and claimed Somons as her own in an attempt to conceal from the IRS the true owner. Moreover, the jury properly could conclude that Ms. McNulty allowed Mr. Beverly to place goods (she was the titleholder to the Mercedes Benz Mr. Beverly purchased), to place property (she was the lessee on two leases negotiated by Mr. Beverly and the named grantee on the deed to at least one parcel of real estate), and to

make expenditures (Mr. Beverly's American Express account was paid exclusively with checks from her checking account) in her name in an effort to defraud the IRS.[29]

3. George Brown

a. guilty verdict

Mr. Brown claims first that the government failed to produce sufficient evidence to sustain either the conspiracy charge or the substantive possession counts because (1) Peter Suarez was an incredible and unreliable witness, (2) the only evidence against Mr. Brown was provided by Suarez and was uncorroborated, and (3) most of the evidence was circumstantial. It is well settled both that a reviewing court will not disturb a jury's credibility findings, *see, e.g., United States v. Edun*, 890 F.2d 983, 988-89 (7th Cir. 1989),[30] and that a conviction may rest solely on circumstantial evidence, *see, e.g., United States v. Durrive*, 902 F.2d 1221, 1225 (7th Cir. 1990). This is true even when the evidence at trial is "totally uncorroborated and

[29] Thus, Ms. McNulty's reliance on *Yates v. United States*, 354 U.S. 298, 311-12 (1957), *overruled on other grounds, Burks v. United States*, 437 U.S. 1 (1978), and its progeny is misplaced. This is not a case where two objects of a conspiracy were charged and there is a legal insufficiency with respect to one of the objects, placing the legality of the conviction under a general verdict in question. *See id.* (statute of limitations had run on one of the charged objectives). As noted above, Ms. McNulty does not challenge the DEA object of the conspiracy and there was sufficient evidence for the jury to convict her under the tax object. As such, the general verdict was permissible.

[30] *But see United States v. Grandinetti*, 891 F.2d 1302, 1307 (7th Cir. 1989) (jury determinations of testimonial truth upheld unless testimony is incredible as a matter of law), *cert. denied*, 110 S. Ct. 1534 (1990); *United States v. Dunigan*, 884 F.2d 1010, 1013 (7th Cir. 1989) (verdicts based solely on accomplice's uncorroborated testimony upheld unless testimony is incredible as a matter of law). However, "[m]ere inconsistencies in the witness' testimony do not render it legally incredible." *Dunigan*, 884 F.2d at 1013.

comes from an admitted liar, convicted felon, large scale drug-dealing, paid government informant," as the defendant claimed in *United States v. Molinaro*, 877 F.2d 1341, 1347 (7th Cir. 1989). We responded in *Molinaro*, as we do today, that "[t]his argument is wasted on an appellate court; [the defendant] thoroughly attacked [the witness'] credibility at trial and the jury, which is the only entity entitled to make such credibility determinations, apparently decided to believe [the witness'] testimony despite his many character flaws." *Id.*; *see United States v. Mejia*, No. 89-2243, slip op. at 4 (7th Cir. Aug. 2, 1990) (rejecting defendant's sufficiency claim, which was based on argument that government witness' testimony was inherently unreliable). Thus, even if uncorroborated and circumstantial, Suarez' testimony that Mr. Brown sold cocaine from the Mayfield house and assisted in the drug transactions between Mr. Beverly and Suarez was sufficient to support the jury verdicts.

Moreover, Mr. Brown's position ignores the fact that the evidence against him was not wholly uncorroborated. Suarez testified that he sold cocaine to Mr. Beverly and Mr. Brown in Chicago on ten separate occasions between April and November of 1986. The government introduced various records from airlines, hotels, and car rental agencies to document Suarez' presence in Chicago on seven of those ten instances.[31] The government also introduced drug paraphernalia, recovered from Mr. Brown's apartment, that was identified as equipment used by drug dealers rather than mere drug users.[32]

[31] As noted above, Mr. Brown was acquitted of the charges stemming from the three occasions on which the government was unable to demonstrate that Suarez had travelled to the city.

[32] We recently noted in *United States v. Valencia*, No. 89-1235, slip op. at 10 (7th Cir. July 16, 1990), that "[t]he intent to distribute drugs has been inferred from . . . possession of drug-packaging paraphernalia."

b. sentencing

Mr. Brown asserts that the district court erred in finding that he was second in command of the drug enterprise. He claims that, because the court sustained his objection to Suarez' description of him as Mr. Beverly's "righthand man," Tr. at 739-40, the court concluded "that there was nothing in the record to indicated [sic] Wes Brown was a right hand man and that he held any possession [sic] of authority in the organization," Brown's Br. at 13. We cannot say that the district court abused its discretion in finding that Mr. Brown held a position of high authority in the drug conspiracy. The decision to sustain the objection during trial means only that it was improper to portray Mr. Brown as Mr. Beverly's "righthand man"; it clearly does not mean that the court made a factual determination that Mr. Brown did not play a key role in the enterprise. Moreover, Mr. Brown's claim ignores evidence, the bulk of which came after the objection, from which the court properly could determine that he was more than just the "errand boy" he claims to have been. Brown's Br. at 13. Suarez stated without objection that, during a meeting to discuss cocaine, Mr. Beverly introduced Mr. Brown as a "close associate, brother like." Tr. at 730. The court heard testimony that Mr. Brown took part in nearly every drug transaction between Mr. Beverly and Suarez. Mr. Brown handled the money used to purchase cocaine, retrieved large quantities of the drug following the transactions, and returned with the narcotics to the Mayfield house. There also was testimony that he sold packages of "white powder" to customers at the Mayfield house for $50 and $100, then converted the powder to rock form for the customers to smoke. Tr. at 746. Based on this evidence, the court certainly did not abuse its discretion in concluding that Mr. Brown played more than a peripheral role in the organization and that he "ran at least one of the smoke houses." Sentencing Tr. at 49. Finally, the court's sentence was based in part on the fact that Mr. Brown had prior contacts with the law and "seem[ed] to have learned no lesson." *Id.* at 50. These

were proper considerations and reveal that the district court exercised its discretion. Accordingly, the sentence is affirmed. *See United States v. Briscoe*, 896 F.2d 1476, 1519 (7th Cir. 1990).

Mr. Brown argues in the alternative that, even if the basis of his sentence was proper, the district court imposed disparate sentences. This claim also lacks merit. As a general matter, a sentence will not be overturned on appeal absent an abuse of the district court's discretion. *United States v. Goot*, 894 F.2d 231, 237 (7th Cir. 1990). "A mere showing of disparity in sentences among codefendants does not, without more, demonstrate any abuse of discretion." *United States v. Marren*, 890 F.2d 924, 937 (7th Cir. 1989). " 'Only when a judge imposes disparate sentences on *similar* defendants without explanation does even an inference of impropriety arise.' " *Briscoe*, 896 F.2d at 1519 (quoting *United States v. Neyens*, 831 F.2d 156, 159 (7th Cir. 1987)) (emphasis in *Neyens*).

Here, it is clear that the district court did not abuse its discretion. The defendants were convicted of different crimes and thus were not "similar." *See id.* Moreover, the court explained why it imposed each sentence and why some sentences were harsher than others. Mr. Beverly was sentenced to thirty-five years because of his prior record and the fact that he was "the ring leader of this . . . very profitable narcotics organization from 1979 through '87." Sentencing Tr. at 47. In Mr. Brown's case, the court considered his prior record and the fact that he had been part of the enterprise for at least eight years, that he ran at least one of the smoke houses, that he aided the transactions between Mr. Beverly and Suarez, and that guns were found in his apartment. *See supra* p. 20; *see also* Sentencing Tr. at 50 ("in light of the fact that you've had contact with the law before and you seem to have learned no lesson, it's appropriate that the Court sentence you . . . to a period of 20 years"). Betty McNulty received a lighter sentence because she had no prior record and her role in the conspiracy was "much less than the involvement of Mr. Brown or Mr. Alex Beverly, who ran

the organization." Sentencing Tr. at 50-51. Finally, Ms. Griffin, who also had a clean record, had "the least involvement" in the enterprise and thus received the lightest sentence. *Id.* at 52. These considerations demonstrate that the court "had a principled basis for sentencing [Mr. Brown] to a stiffer penalty." *Marren*, 890 F.2d at 937. The court contemplated each sentence imposed and thoroughly explained any disparity among the sentences. Thus, not even an inference of impropriety arises. *See Briscoe*, 896 F.2d at 1519. Accordingly, Mr. Brown's sentence is affirmed.

4. Diane Griffin

a. sufficiency of evidence

Like Ms. McNulty, Ms. Griffin was found guilty on the dual-objective conspiracy charge. She claims first that the evidence was insufficient to support her conviction. As noted above, the verdict will be upheld unless there is no evidence from which the jury could find guilt beyond a reasonable doubt. *See United States v. Durrive*, 902 F.2d 1221, 1225 (7th Cir. 1990). Because this case was tried to a jury, "we must on review defer to reasonable inferences drawn by the jury and the weight it gave to the evidence. Likewise, we leave the credibility of witnesses solely to the jury's evaluation, absent extraordinary circumstances." *United States v. Hogan*, 886 F.2d 1497, 1502 (7th Cir. 1989) (citation omitted). With regard to the conspiracy charged in this case, "[i]t is fundamental that a conviction for conspiracy under 18 U.S.C. § 371 cannot be sustained unless there is 'proof of an agreement to commit an offense against the United States.' " *Ingram v. United States*, 360 U.S. 672, 677-78 (1959) (quoting *Pereira v. United States*, 347 U.S. 1, 12 (1954)).

Because the government concedes that there was no evidence to support a conviction under the DEA arm of the conspiracy, the verdict can be upheld only if there was sufficient evidence to establish that Ms. Griffin knowingly allowed Mr. Beverly to put assets in her name in order

to impede the IRS in ascertaining Mr. Beverly's taxable income. We conclude that there was. The record supports that Ms. Griffin (1) allowed Mr. Beverly to put property he owned in her name, (2) filed a false tax return claiming Mr. Beverly's income as her own, and (3) used Mr. Beverly's money to purchase a car in her name. Moreover, a rational jury could have found that at least two of Ms. Griffin's actions are "reasonably explainable only in terms of motivation to evade taxation," *id.* at 679. First, the jury could have found that Mr. Beverly actually owned Tit's[32] and that Ms. Griffin filed tax returns claiming it as her own in order to conceal his ownership. The jury also could have determined that Ms. Griffin underreported the income from Tit's as part of the scheme: she claimed that the income from Tit's, a cash lounge, was only $5,459 in 1985, yet Suarez testified that on one occasion alone Mr. Beverly took $2,000 from the cash register at Tit's to purchase cocaine.

Second, the manner in which the $35,000 Jaguar was purchased in 1985 is indicative of the unlawful motivation to impede the IRS: as noted above, an initial down payment of $500 in cash was made on the car on September 16. A $7,000 payment was made on September 23 by check, followed by cash payments on September 30 ($8,000), October 1 ($7,000), October 2 ($6,000), and October 3 ($7,186). Paid over a short period of time and largely in cash, the purchase was structured such that the reporting requirement regarding cash payments in excess of $10,000 was not triggered. *See* 26 U.S.C. § 6050I; *see also United States v. Bucey*, 876 F.2d 1297, 1306 n.17 (7th Cir.), *cert. denied*, 110 S. Ct. 565 (1989). A jury was entitled to find

[32] The evidence revealed that the bar had been purchased in Ms. Griffin's name, but Mr. Beverly purchased the building that housed Tit's and paid for its complete renovation and furnishings. He also took several thousand dollars from the cash register on at least one occasion. Moreover, Ms. Griffin did not tell Johnny Davis that she owned the bar but responded that it was "[hers] to run." Tr. at 209.

on this evidence that Ms. Griffin intended to impair the IRS in assessing Mr. Beverly's taxes.

Relying on *Ingram* and *United States v. Krasovich*, 819 F.2d 253 (9th Cir. 1987), Ms. Griffin asserts that the government was required to prove more than the hiding of assets because her conduct may be explained by motives other than a desire to impede the IRS. For example, she may have been helping Mr. Beverly conceal his gambling, or she could have been merely a girlfriend willing to accept real estate, a business, a bank account, and a luxury car from her "sugar daddy." Griffin's Br. at 32. Her reliance on these cases is misplaced. In *Ingram*, where income from illegal gambling activity was concealed, there was no evidence that the defendants were aware of any tax liability. 360 U.S. at 677. Here, the jury could infer that Tit's actually belonged to Mr. Beverly and that Ms. Griffin was aware of his tax liability from the bar because she filed tax returns regarding that asset. Thus, unlike the evidence in *Ingram*, the evidence adduced in this trial was not remote. *See Hogan*, 886 F.2d at 1503. In *Krasovich*, the defendant hid the true ownership of a pickup truck by registering the truck in his own name, although he never filed a tax return claiming ownership of the vehicle or otherwise indicated that it was his. 819 F.2d at 254. Thus, "[n]othing in the circumstances of the transaction suggest[ed] that [he] knew that the purpose of the concealment was to evade taxes." *Id.* at 256. Here, on the other hand, Ms. Griffin allowed assets to be purchased in her name and represented to the government in her tax return that she owned Tit's bar.

Moreover, to prove a conspiracy, not every reasonable hypothesis of innocence need be excluded; the total evidence must allow the jury to conclude that the defendant is guilty beyond a reasonable doubt. *See United States v. Khorrami*, 895 F.2d 1186, 1191 (7th Cir. 1990); *United States v. Grier*, 866 F.2d 908, 923 (7th Cir. 1989). In *United States v. Pace*, 898 F.2d 1218, 1236 (7th Cir.), *cert. denied*, 110 S. Ct. 3286 (1990), the defendant maintained that the evidence failed to support the forfeiture of money

found in his home because the circumstances indicated that the cash was related to his gambling activities rather than any narcotics transaction. Our holding there is equally applicable in this case. We stated that, "while the jury could have inferred that the money was related to gambling, not cocaine, the jury could have also inferred that the money was related to the cocaine transaction. The choice of which inference to draw was for the jury, and we will not disturb that choice." *Id.* Accordingly, we conclude that the record supports the jury's conclusion that Ms. Griffin conspired to impede the IRS in ascertaining Mr. Beverly's taxable income.

b. general verdict

Our inquiry with regard to Ms. Griffin's conviction does not end with the determination that the evidence supports the jury's verdict. Ms. Griffin also claims that she is entitled to a new trial based on the verdict form. She maintains that, because the jury returned a general verdict, it is impossible to determine whether she was convicted for conspiracy to defraud the IRS—for which there is sufficient evidence—or for conspiracy to defraud the DEA—which the government failed to prove.

There have been a number of Supreme Court and appellate decisions on the problems that stem from general verdicts. The critical factor in many of these cases is whether the appellant's claim is based on an alleged legal insufficiency or an alleged factual insufficiency. As noted above, "[t]he general rule is that when a jury returns a guilty verdict on an indictment charging several acts in the conjunctive, . . . the verdict stands if the evidence is sufficient with respect to any one of the acts charged." *Turner v. United States*, 396 U.S. 398, 420 (1970). This rule does not hold true, however, when a general jury verdict renders it impossible to say whether a defendant was convicted on an unconstitutional or legally invalid ground. Thus, the conviction must "be set aside in cases where the verdict is supportable on one ground, but not on another, and it is impossible to tell which ground the jury selected." *Yates v. United States*, 354 U.S. 298, 312 (1957), *overruled on other grounds, Burks v. United States*, 437 U.S. 1 (1978).[34]

Ms. Griffin relies on this language from *Yates*. However, the insupportable ground in that case was legal in nature rather than factual. As with Ms. Griffin, the defendant in *Yates* was charged with and convicted of a dual-objective conspiracy under 18 U.S.C. § 371. *Id.* at 300-01. However, the Supreme Court held that prosecution under one arm of the conspiracy was barred by the statute of limitations. The Court therefore concluded that, because the general verdict made it impossible to determine the basis of the jury's verdict, the judgment had to be set aside. *Id.* at 311-12. Thus, in *Yates* the theory supporting an object of the conspiracy was *legally* insufficient; here, the *evidence* fails to establish one object of the charged conspiracy.

Numerous courts have reversed general verdicts on the basis of *Yates* where one of the objects in a multi-object count is legally invalid.[35] Only a few courts, including this

[34] The *Yates* decision relies on *Cramer v. United States*, 325 U.S. 1, 36 n.45 (1945) (general verdict must be set aside if any of the acts charged did not legally constitute treason); *Williams v. North Carolina*, 317 U.S. 287, 291-92 (1942) (judgment based on general verdict cannot stand where one ground upon which it might rest is constitutionally invalid); *Stromberg v. California*, 283 U.S. 359, 367-70 (1931) (conviction reversed where one objective was unconstitutional and general verdict made it impossible to identify on which objective the judgement rested). For post-*Yates* decisions, *see, e.g., Bachelier v. Maryland*, 397 U.S. 564, 571 (1970); *Leary v. United States*, 395 U.S. 6, 30-32 (1969); *Street v. New York*, 394 U.S. 576, 585-88 (1969).

[35] *See, e.g., Feela v. Israel*, 727 F.2d 151, 155 (7th Cir. 1984) (conviction overturned where court could not determine if jury based its decision on erroneously introduced evidence, for "where a verdict is general, and conviction under one of several alternate theories would be unconstitutional, the conviction must be set aside lest the verdict rest on an unconstitutional basis"); *Cramer v.*

(Footnote continued on following page)

one, have examined specifically the issue of whether a conviction may be upheld where there is a failure of proof, rather than a legal insufficiency, with regard to one of the objects. In *United States v. Alvarez*, 860 F.2d 801, 815-18 (7th Cir. 1988), the court determined, based on *Yates* and *United States v. Holzer*, 840 F.2d 1343 (7th Cir. 1988),[36] that a CCE conviction could not stand because the evidence failed to show that the defendant had supervised two of the seven alleged subordinates and the jury did not indicate which five persons it found the defendant to have supervised. However, we subsequently granted rehearing and affirmed the conviction. *See United States*

[35] *continued*
Fahner, 683 F.2d 1376, 1379 (7th Cir.) (conspiracy conviction reversed where verdict could have been based illegally on overt acts which occurred after conspiracy ended; because court was "unable to tell whether the jury based its verdict on the valid or invalid counts, the general conspiracy conviction was unconstitutional"), *cert. denied*, 459 U.S. 1016 (1982); *United States v. Head*, 641 F.2d 174, 179 (4th Cir. 1981) (conviction based on general verdict reversed where basis of multi-object conspiracy charge rested on acts occurring outside statute of limitations and district court refused to instruct jury that it had to find an overt act committed within the applicable period); *United States v. Kavazanjian*, 623 F.2d 730, 739-40 (1st Cir. 1980) (general verdict multi-object conspiracy conviction under 18 U.S.C. § 371 reversed where one object failed to state a crime); *United States v. Carman*, 577 F.2d 556, 566-68 (9th Cir. 1978) (conviction based on general verdict reversed where single conspiracy count charged commission of multiple substantive acts and one substantive count was reversed for failure to state a crime); *United States v. Baranski*, 484 F.2d 556, 560-61 (7th Cir. 1973) (general verdict of guilty for multi-object conspiracy in violation of 18 U.S.C. § 371 reversed where one object found unconstitutional); *United States v. Driscoll*, 449 F.2d 894, 898 (1st Cir. 1971) (general verdict on multi-object conspiracy charge overturned where one object was legally insufficient), *cert. denied*, 405 U.S. 920 (1972).

[36] In *Holzer*, mail fraud convictions were reversed in light of *McNally v. United States*, 483 U.S. 350 (1987). Because the jury could have found that the mail fraud charges constituted the necessary predicate offenses to a racketeering count, that conviction was vacated as well. 840 F.2d at 1352.

v. Holquin, 868 F.2d 201, 202-04 (7th Cir.), *cert. denied*, 110 S. Ct. 97 (1989). On rehearing, the government asserted that "*Yates* and *Holzer* do not apply to sufficiency of evidence claims such as those presented here," but rather only to cases where " 'a count in an indictment specifies more than one ground upon which a conviction on that count may be based, and one of those specific grounds is unconstitutional or otherwise legally deficient.' " *Id.* at 202 (quoting Government's Br.). We concluded that "there is merit to this submission." *Id.* at 203. Based on several Ninth Circuit cases that held "that *Yates* does not apply to insufficiency of evidence claims,"[37] a result with which the Seventh Circuit had expressed general agreement,[38] the court determined that "these cases must control the outcome here." *Id.* Accordingly, because there was evidence that the defendant had supervised at least five individuals, the court affirmed the CCE conviction. *Id.* at 204.

[37] *See, e.g., United States v. Halbert*, 640 F.2d 1000, 1008 (9th Cir. 1981); *United States v. Phillips*, 606 F.2d 884, 886 n.1 (9th Cir. 1979), *cert. denied*, 444 U.S. 1024 (1980); *United States v. Jessee*, 605 F.2d 430, 431 (9th Cir. 1979); *United States v. Outpost Dev. Co.*, 552 F.2d 868, 869-70 (9th Cir.), *cert. denied*, 434 U.S. 965 (1977).

[38] *See United States v. Soteras*, 770 F.2d 641, 646 (7th Cir. 1985) (dual-object conspiracy conviction under section 371 affirmed where sufficient evidence supported one object; court did not have to examine whether evidence supported the second object); *see also United States v. Alexander*, 748 F.2d 185, 189 (4th Cir. 1984) (court need not decide whether evidence supported second theory of count where sufficient evidence supported first theory and record indicated that jury relied on first theory), *cert. denied*, 472 U.S. 1027 (1985); *United States v. Alvarez*, 735 F.2d 461, 465-66 (11th Cir. 1984) (conviction will be affirmed for multi-objective conspiracy if the evidence supports at least one objective); *cf. United States v. Berardi*, 675 F.2d 894, 902 (7th Cir. 1982) (where jury receives "one is enough" charge that any of the multiple acts alleged in the count may support conviction, general verdict may be upheld only if sufficient evidence supports each act alleged).

Only months after *Holguin* was decided, this court heard *United States v. Bucey*, 876 F.2d 1297 (7th Cir.), *cert. denied*, 110 S. Ct. 565 (1989). In *Bucey*, the jury convicted the defendant, by general verdict, of conspiracy to defraud the government in violation of 18 U.S.C. § 371. The multi-object conspiracy count included, as here, both a tax and drug object. *Id.* at 1311 n.26. In analyzing the legal claim that none of the acts comprising the conspiracy constituted a criminal offense, the court acknowledged the "general tenet of conspiracy law that when an indictment alleges a conspiracy with multifarious objectives, a conviction will be sustained so long as the evidence is sufficient to show that the defendants agreed to accomplish at least one of the alleged objectives." *Id.* at 1312. The court affirmed the conspiracy conviction and explicitly recognized the distinction between legally and factually impermissible grounds of conviction:

> Because none of the objectives upon which the jury may have relied involves a legally invalid or unconstitutional basis for conviction, the general verdict form does not require reversal of [the defendant's] conspiracy conviction.

Id. at 1312 n.27. Thus, the court found that it was unnecessary to examine whether the evidence supported all of the objectives and examined instead only whether the evidence supported the tax objectives. *Id.* at 1312 n.28. Concluding that it did, the conviction was affirmed. *Id.* at 1313. *See United States v. Soteras*, 770 F.2d 641, 646 (7th Cir. 1985).

This court most recently examined the issue in *United States v. Sababu*, 891 F.2d 1308 (7th Cir. 1989), where the defendant claimed that his conviction may have been based on an illegal ground and that the general verdict should be vacated. The court rejected this claim because none of the grounds "were unconstitutional or legally deficient. Moreover, a conspiracy conviction will be [up]held as long as the evidence shows that the defendants agreed to commit at least one of the alleged objectives of the

conspiracy." *Id.* at 1326 n.6. Because the evidence showed that the defendants agreed to the alleged objectives, the court concluded that there was no basis for overturning the jury's general verdict. *Id.*

We note that the Second Circuit recently evaluated a claim similar to Ms. Griffin's and failed to make a distinction between factual and legal insufficiency. In *United States v. Garcia*, No. 90-1088, slip op. at 3 (2d Cir. June 29, 1990), the defendants claimed that the evidence did not support their conviction under a dual-object conspiracy charge. The court concluded that a new trial was warranted because one of the two theories advanced by the government in support of the charge was not established by the evidence.[39] *Id.* We do not find this case persuasive.

[39] The Third Circuit may agree with this holding. *See United States v. Dansker*, 537 F.2d 40, 51 (3d Cir. 1976) (general verdict for dual-objective conspiracy count reversed where evidence was insufficient to support conviction under one objective), *cert. denied*, 429 U.S. 1038 (1977). This case may be distinguishable, however, on the ground that the trial court gave, with respect to the *objective* of the conspiracy, a "one is enough" instruction. *See United States v. Holguin*, 868 F.2d 201, 203 n.5 (7th Cir. 1989). *But see United States v. Velasquez*, 885 F.2d 1076, 1090-91 (3d Cir. 1989) (conspiracy conviction reversed where no legal basis existed to support verdict because only named co-conspirator had been determined previously not to have joined conspiracy), *cert. denied*, 110 S. Ct. 1321 (1990).

The only other court that has indicated in any way that it might agree with the Second Circuit on this issue is the First Circuit, although its position is unclear. The First Circuit has not addressed directly whether there is a distinction between factual and legal insufficiencies, but it has relied on *United States v. Natelli*, 527 F.2d 311, 325 (2d Cir. 1975), *cert. denied*, 425 U.S. 934 (1976), the one case supporting the view taken in *Garcia*, *see infra* note 40. However, the insufficiencies in these cases were legal rather than factual. *See, e.g., United States v. Kavazanjian*, 623 F.2d 730, 740 (1st Cir. 1980) (citing *Natelli*, court reversed general verdict multi-object conspiracy conviction under 18 U.S.C. § 371 where one object failed to state a crime); *United States v. Moynagh*, 566 F.2d 799, 804 (1st Cir. 1977) (relying on *Natelli*, general verdict reversed

(Footnote continued on following page)

First, the Garcia panel did not recognize any Supreme Court precedent or address the factual/legal distinction issue, but relied solely on two of its prior decisions.[40] Second, one of those prior Second Circuit cases specifically identified the legal/factual distinction and found it outcome determinative. In *United States v. Ruggiero*, 726 F.2d 913 (2d Cir.), *cert. denied*, 469 U.S. 831 (1984), the Second Circuit reversed a RICO conviction where a "*legally insufficient* predicate act . . . may have been necessary to the verdict." *Id.* at 921 (emphasis supplied). Moreover, the *Ruggiero* court distinguished *United States v. Natelli*, 527 F.2d 311, 325 (2d Cir. 1975), *cert. denied*, 425 U.S. 934 (1976), the other case relied upon in *Garcia*, on the ground that *Natelli* addressed whether the evidence was sufficient to support one of several acts alleged within the charge rather than the legal sufficiency of the charge itself. *Id.* at 922. Finally, other precedent from within the Second Circuit does not support what appears to be the anomalous result in *Garcia*.[41]

[39] *continued*

where defendants' conduct could not constitute a crime), *cert. denied*, 435 U.S. 917 (1978); *cf. United States v. Driscoll*, 449 F.2d 894, 898 (1st Cir. 1971) (general verdict on multi-object conspiracy charge reversed because one object legally insufficient), *cert. denied*, 405 U.S. 920 (1972).

[40] *See United States v. Ruggiero*, 726 F.2d 913, 921-22 (2d Cir.) (RICO conviction reversed where legally insufficient predicate act may have been necessary to verdict), *cert. denied*, 469 U.S. 831 (1984); *Natelli*, 527 F.2d at 325 (court relied on "the general principle" of *Yates* and found that general verdict was ambiguous and therefore reversible where one object in multi-object count was unsupported by the evidence; court did not identify that *Yates* related to legal insufficiency).

[41] *See United States v. Rastelli*, 870 F.2d 822, 830-31 (2d Cir.) (conviction upheld where one object was *legally insufficient*, but instructions made it clear that jury also found second object, which was legally and factually sufficient; had it not been clear, reversal would have been required under *Ruggiero*), *cert. denied*, 110 S. Ct. 515 (1989); *United States v. Southland Corp.*, 760 F.2d 1366,

(Footnote continued on following page)

Accordingly, we rely on precedent from this circuit that draws the distinction between legal and factually unsupported objects in multi-object conspiracy cases. Based on an application of the principles discussed in these decisions, we must affirm the jury's verdict. As discussed above, the evidence supports Ms. Griffin's conviction under the tax objective. Thus, there is no basis for overturning the jury's general verdict. *See Turner*, 396 U.S. at 420; *Sababu*, 891 F.2d at 1326 n.6; *Bucey*, 876 F.2d at 1312; *Holguin*, 868 F.2d at 202-04.

Finally, we do not understand why, once the government admitted it could not link Ms. Griffin to the DEA objective of the conspiracy count, the district court failed to grant a partial judgment of acquittal with respect to that count. Nevertheless, we do not believe that this failure resulted in substantial prejudice. In instructing the jury, the district court specifically referred to the conspiracy charged in count twenty as "the tax conspiracy." Tr. at 3624. Moreover, in acknowledging a misstatement made in closing argument, the Assistant United States Attorney specifically noted that the government did not contend that Ms. Griffin had conspired to defraud the DEA.

Conclusion

For the foregoing reasons, we affirm the convictions and sentences of each defendant.

AFFIRMED

[41] *continued*

1378 (2d Cir.) (dual-object conspiracy conviction upheld where evidence was sufficient under one object but may have been insufficient under second object), *cert. denied*, 474 U.S. 825 (1985); *United States v. Papadakis*, 510 F.2d 287, 297-98 (2d Cir.) (multi-object conspiracy conviction upheld where one object was not supported by evidence but other object was), *cert. denied*, 421 U.S. 950 (1975).

54 Nos. 88-2985, 88-2986, 88-2987 & 88-2988

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Clerk of the United States Court of Appeals for the Seventh Circuit

USCA 79004—Midwest Law Printing Co., Inc., Chicago—9-7-90—500

COUNT TWENTY

1. The Grand Jury realleges and incorporates by reference herein paragraphs 1 through 17 of Count One and paragraphs 1 and 2 of Count Twenty-Three.

2. From at least in or about early 1982, the exact date being unknown, through and including the date of this indictment, at Chicago, in the Northern District of Illinois, Eastern Division,

ALEX BEVERLY,
also known as Sticks,
BETTY McNULTY, and
DIANE GRIFFIN,

defendants herein, did knowingly combine, conspire, confederate, and agree together and with others known and unknown to the Grand Jury to defraud the United States by impeding, impairing, obstructing and defeating the lawful functions of the Department of the Treasury, in particular, the Internal Revenue Service, in the ascertainment, computation, assessment and collection of the revenue: to wit, income taxes, and by impeding, impairing, obstructing and defeating the lawful functions of the Department of Justice, in particular the Drug Enforcement Administration, in the ascertainment of forfeitable assets.

3. It was part of the conspiracy that defendants BETTY McNULTY and DIANE GRIFFIN would assist defendant ALEX BEVERLY, also known as Sticks, in concealing from the Internal Revenue Service, the Drug Enforcement Administration and other law enforcement agencies, income and assets obtained by him with proceeds of illegal distribution of narcotics, by acting as nominees and having real properties, money, cars and businesses which were purchased, owned and controlled by defendant ALEX BEVERLY, also known as Sticks, placed in their names.

4. It was further part of the conspiracy that defendants BETTY McNULTY and DIANE GRIFFIN acted as nominee or straw owners of real and personal property purchased by ALEX BEVERLY in order to conceal his interest in said property.

5. It was further part of the conspiracy that in or about February 1985, Blacom, Inc. was orgainized and incorporated under the laws of the State of Illinois for the purpose of serving as a holding company for retail businesses and real properties owned by defendant ALEX BEVERLY, also known as Sticks. At the time of incorporation, another individual, who made no investment in the corporation and had no control and authority over and involvement in the corporation's activities, was named in the Articles of Incorporation as the sole shareholder, director and officer.

6. It was further part of the conspiracy that defendants ALEX BEVERLY, also known as Sticks, and BETTY McNULTY placed titles to real estate purchased by ALEX BEVERLY, also known as Sticks, in the name of BETTY McNULTY.

7. It was further part of the conspiracy that defendants ALEX BEVERLY, also known as Sticks, and BETTY McNULTY, transferred and caused to be transferred real property purchased by ALEX BEVERLY, also known as Sticks, into land trusts the beneficial interests of which were held by defendant DIANE GRIFFIN and Blacom Corporation.

8. It was further part of the conspiracy that on or about March 18, 1984 and April 17, 1986, defendant DIANE GRIFFIN signed, filed and caused to be filed United States Individual Income Tax Returns for the years 1983, 1984 and 1985 which returns falsely stated that she was the owner of Tits Lounge, 1454 South Pulaski, Chicago, Illinois.

9. It was further part of the conspiracy that on or about November 25, 1986, defendant BETTY McNULTY signed, filed and caused to be filed a United States Individual Income Tax Return for the year 1985 which return falsely stated that she was

the owner of Blacon Food and Liquor, 3859 West Ogden, Chicago, Illinois and Somon's, 5304 West Madison Street, Chicago, Illinois.

10. It was further part of the conspiracy that on or about November 28, 1986, defendant BETTY McNULTY signed and filed and caused to be filed a United States Corporation Income Tax Return for Blacom, Inc. for the fiscal year May 1, 1985 through April 30, 1986, which return falsely stated that she was a sixty percent shareholder of the corporation and that four other individuals were each ten percent shareholders. All of the shareholders were nominees for defendant ALEX BEVERLY, also known as Sticks, who at all times material to this indictment owned and controlled Blacom, Inc. and its businesses.

11. It was further part of the conspiracy that defendants ALEX BEVERLY, also known as Sticks, BETTY McNULTY and DIANE GRIFFIN placed and caused to be placed, titles to luxury cars including a 1983 Mercedes and a 1986 Jaguar, purchased and owned by defendant ALEX BEVERLY, also known at Sticks, in the names of defendants BETTY McNULTY and DIANE GRIFFIN.

12. It was further part of the conspiracy that defendant BETTY McNULTY used a bank account in her name at the Pioneer Bank, Chicago, Illinois, to pay for items purchased by defendant ALEX BEVERLY, also known as Sticks, with money obtained from defendant ALEX BEVERLY, also known at Sticks.

Overt Acts

13. In furthrance of the conspiracy and to effect the objects thereof, the defendants committed the following overt acts.

a. On or about August 30, 1983, defendant DIANE GRIFFIN, became the beneficiary of LaSalle National Bank Trust No. 10-4346-08.

b. On or about March 18, 1984, defendant DIANE GRIFFIN, signed and filed and caused to be filed a false United States Individual Income Tax Return for the year 1983.

c. On or about January 17, 1985 defendant BETTY McNAULTY, signed a deed transferring title of a property located at 1812 S. Millard, Chicago, Illinois to LaSalle National Bank Trust No. 10-4346-08.

d. On or about January 17, 1985, defendant BETTY McNULTY, signed a deed transferring the title of a property located at 1811 S. Harding, Chicago, Illinois to LaSalle National Bank, Trust No. 10-4346-08.

e. On or about January 17, 1985 defendant ALEX BEVERLY, also known as Sticks, transferred title of property located at 5436-38 W. Division, Chicago, Illinois, to LaSalle National Bank Trust No. 10-4346-08.

f. On or about July 1, 1985 defendant ALEX BEVERLY, also known as Sticks, transferred title of property located at 1456 South Pulaski, Chicago, Illinois to Diane Smith.

g. On or about December 27, 1985 defendant BETTY McNULTY, signed a real estate contract for the purchase of property located at 5401-03 West Madison, Chicago, Illinois.

h. On or about January 3, 1986 defendants ALEX BEVERLY, also known as Sticks, and BETTY McNULTY had a meeting at which BEVERLY directed the distribution of shares of Blacom, Inc. stock and appointed officers of the corporation.

i. On or about July 15, 1986 defendant BETTY McNULTY, signed and received a State of Illinois registration card for a 1983 grey Mercedes Benz 300 series four door sedan.

j. On or about November 17, 1986 defendant BETTY McNULTY, signed, and filed and caused to be filed a United States Individual Income Tax Return for the year 1985.

k. On or about November 28, 1986 defendant BETTY McNULTY, signed and filed and caused to be filed a United States Corporation Income Tax Return for Blacom, Inc. for the fiscal year May 1, 1985 through April 30, 1986.

In violation of Title 18, United States Code, Section 371.

ORIGINAL

No. 90-6352

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

DIANE GRIFFIN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether a conviction for a multiple-object conspiracy must be set aside where the jury returns a general verdict and the evidence is insufficient to support one of the objects of the conspiracy.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

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BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-54) is reported at 913 F.2d 337.[1]

JURISDICTION

The judgment of the court of appeals was entered on September 7, 1990. The petition for a writ of certiorari was filed on November 27, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

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[1] The petition appendix is unpaginated. Our citations to the petition appendix refer to the page numbers of the court of appeals' slip opinion reproduced there.

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Illinois, petitioner was convicted of conspiring to defraud the United States, in violation of 18 U.S.C. 371. She received a suspended sentence and was placed on probation for five years on condition that she participate in a work release program for the first six months of probation, obtain and maintain employment, and perform 500 hours of community service. The court of appeals affirmed. Pet. App. 1-54.

1. From 1980 to 1986, Alex Beverly controlled a large narcotics operation in Chicago, Illinois. Pet. App. 2-7. In 1988, a grand jury returned a 23-count indictment against Beverly, Betty McNulty, petitioner, and others arising from Beverly's drug operation and his attempts to conceal assets and income. Count 20 charged that Beverly, McNulty, and petitioner participated in a conspiracy to defraud the federal government through two means: (1) impairment of the efforts of the Internal Revenue Service to ascertain income taxes (the IRS object); and (2) impairment of the efforts of the Drug Enforcement Administration to ascertain forfeitable assets (the DEA object).[2]

The evidence showed that Beverly held and controlled assets in the names of both McNulty and petitioner. He arranged for McNulty to becom[illegible]without capital contribution) the majority shareholder of Blacom Corporation, a company that Beverly used to

[2] The petition appendix contains a copy of Count 20 of the indictment.

control various properties he acquired through his drug operation. Pet. App. 10-12. Beverly also placed real estate and a Mercedes Benz automobile that he used in McNulty's name. Id. at 12-13. Following the same modus operandi, Beverly purchased a tavern and an adjoining building in petitioner's name, and petitioner filed tax returns claiming the tavern as her own to conceal Beverly's ownership of the business and his underreporting of related income. Id. at 13, 44 & n.33. Beverly also purchased a $35,000 Jaguar automobile in petitioner's name, and Beverly and petitioner structured the payments to evade federal reporting requirements for cash payments in excess of $10,000 (26 U.S.C. 6050I). Pet. App. 14 & n.8, 44.

During the trial, petitioner unsuccessfully moved for severance, arguing that the government had failed to prove that petitioner knew Beverly was a drug dealer or that petitioner was aware of the DEA object of the conspiracy. Pet. App. 19. At the close of the trial, petitioner proposed a jury instruction that would have required the jury to find that petitioner knew that the object of the conspiracy was to impede the IRS in ascertaining Beverly's taxes. Ibid. She also asked the court to require the jury to identify, through special interrogatories, whether petitioner had knowledge of the IRS and DEA objects of the conspiracy. The court denied both the proposed jury instruction and the request for spec-

ial interrogatories. The jury returned a general verdict against Beverly, McNulty, and petitioner on the conspiracy count. Ibid.[3]

2. The court of appeals affirmed petitioner's conviction. The court of appeals first found that there was sufficient evidence to convict petitioner for participation in the IRS object of the conspiracy. Pet. App. 43-46. The court then rejected petitioner's contention that her conviction should be vacated because it was impossible to determine from the general verdict whether she was convicted of conspiracy to defraud the IRS--which the government had demonstrated through sufficient evidence--or for conspiracy to defraud the DEA--which the government conceded that it had failed to prove. The court explained that where the indictment charges a multiple-object conspiracy, a general verdict can stand as long as there is sufficient evidence to support one of the objects of the conspiracy. Id. at 43, 46-53.

ARGUMENT

Petitioner seeks review of a single issue: whether a conviction for a multiple-object conspiracy must be set aside if, as in this case, the evidence is insufficient to support one of the objects of the conspiracy. In our view, the court of appeals correctly resolved that issue, holding that petitioner's conviction must be affirmed if there is sufficient evidence to support any of the objects identified in the indictment. Although we believe the court of appeals' decision is correct, that decision conflicts with

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[3] The jury also found Beverly, McNulty, and other defendants guilty of various other offenses. Pet. App. 1-2.

decisions of other courts of appeals. Because the underlying issue is important and it arises frequently, this Court should grant the petition for a writ of certiorari to resolve the conflict among the circuits.

1. As this Court has repeatedly emphasized, appellate courts perform a limited function in reviewing jury verdicts. United States v. Powell, 469 U.S. 57, 66-67 (1984); Burks v. United States, 437 U.S. 1, 16-17 (1978); Glasser v. United States, 315 U.S. 60, 80 (1942). The reviewing court does not "weigh the evidence or determine the credibility of witnesses." Ibid. Rather, the sole question for the court is whether there is sufficient evidence to support the jury verdict. Powell, 469 U.S. at 67; Burks, 437 U.S. at 17; Glasser, 315 U.S. at 80. Thus, "when a jury returns a guilty verdict on an indictment charging several acts in the conjunctive, * * * the verdict stands if the evidence is sufficient with respect to any one of the acts charged." Turner v. United States, 396 U.S. 398, 420 (1970). This "general rule" applies in indictments charging crimes, such as conspiracy or racketeering, that involve multiple objects or predicate acts. Thus, the court of appeals correctly held in this case that petitioner's conviction on an indictment charging a dual-object conspiracy should stand because there was sufficient evidence to support one of the objects identified in the indictment. Pet. App. 46-47.

Petitioner contends, nonetheless, that this Court's decision in Yates v. United States, 354 U.S. 298 (1957), requires that her

conviction be set aside. In Yates, the defendant was charged under the Smith Act, 18 U.S.C. 2385, with participating in a conspiracy to advocate the violent overthrow of the government and to organize a society or group for that purpose. 354 U.S. at 300. The Court determined that the district court incorrectly instructed the jury as to the latter object and vacated the conviction (id. at 310-312), stating:

> In these circumstances we think the proper rule to be applied is that which requires a verdict to be set aside in cases where the verdict is supportable on one ground, but not another, and it is impossible to tell which ground the jury selected.

Id. at 312. As the court of appeals correctly explained, Yates dealt with the situation where a jury, incorrectly instructed on the law, might have convicted an individual for engaging in conduct that is not a crime. That rule does not apply where the reviewing court determines that the jury was properly instructed, and where the only flaw in the invalid object is one of evidentiary insufficiency. In that setting, the principle set forth in Turner controls: the jury is presumed to have correctly evaluated the evidence and convicted the defendant on the theory for which there was sufficient evidence. See Pet. App. 46-49, 53.

2. Although the court of appeals' decision is correct, it conflicts with a long line of Third Circuit cases stating that if a defendant is charged with multiple predicate or object offenses, the evidence must be sufficient to prove all of them if the court cannot determine which specific offenses the jury relied upon in reaching its verdict. See United States v. Vastola, 899 F.2d. 211,

288 (RICO), cert. granted and judgment vacated on other grounds, 110 S. Ct. 3233 (1990); United States v. Zauber, 857 F.2d 137, 151-152 (1988) (RICO), cert. denied, 489 U.S. 1066 (1989); United States v. Riccobene, 709 F.2d 214, 227 (RICO), cert. denied, 464 U.S. 849 (1983); United States v. Brown, 583 F.2d 659, 669 (1978) (RICO), cert. denied, 440 U.S. 909 (1979); United States v. Tarnopol, 561 F.2d 466, 474 (1977) (conspiracy); United States v. Dansker, 537 F.2d 40, 51 (1976) (conspiracy), cert. denied, 429 U.S. 1038 (1977). See also United States v. Ryan, 828 F.2d 1010, 1015 (1987) (false statements). The Second Circuit, on at least one occasion, had reached a similar result. United States v. Garcia, 907 F.2d 380, 381 (2d Cir. 1990) (conspiracy).

To be sure, it is possible to discount the conflict among the circuits on various grounds. For example, the Third Circuit affirmed the RICO convictions in Vastola and Riccobene, concluding, based on other portions of the jury verdicts, that "the jury did not rely on the challenged predicate offense when reaching its verdict on the RICO charge." Vastola, 899 F.2d at 228; Riccobene, 709 F.2d at 228. See also Zauber, 857 F.2d at 151-154. Additionally, the Second Circuit's decision in Garcia is inconsistent with other decisions from that Circuit that have upheld dual-object conspiracies where only one of the objects was proved. See United States v. Mowad, 641 F.2d 1067, 1073-1074 (2d Cir.), cert. denied, 454 U.S. 817 (1981); United States v. Papadakis, 510 F.2d 287, 297

(2d Cir.), cert. denied, 421 U.S. 950 (1975). And the approach in other circuits is unsettled. See Pet. App. 51 n.39.[4]

At bottom, however, the conflict between the Third and Seventh Circuits is genuine and is likely to persist. The conflict reflects a fundamental disagreement as to the proper consequences when a reviewing court determines that there is sufficient evidence to support a conspiracy conviction based on some, but not all, of a conspiracy's objects. That disagreement has great practical importance. The federal government frequently prosecutes multiple-object conspiracies in connection with the laws governing controlled substances, racketeering, securities, and financial institutions. Many of those prosecutions involve complex factual situations. Given that complexity, it is not unusual for a reviewing court to conclude that the evidence is sufficient to prove some, but not all, of the objects of the conspiracy identified in the indictment. The cost of retrying those cases is substantial. We accordingly submit that the Court should resolve the longstanding conflict among the circuits.

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[4] The First, Fifth, Eighth, Ninth, and Eleventh Circuits appear to follow the rule that the Seventh Circuit applied in this case. See United States v. Johnson, 713 F.2d 633, 645-646 & n.15 (11th Cir. 1983), cert. denied, 465 U.S. 1081 (1984); United States v. Halbert, 640 F.2d 1000, 1008 (9th Cir. 1981); United States v. Murray, 621 F.2d 1163, 1171 (1st . Cir.), cert. denied, 449 U.S. 837 (1980); United States v. Phillips, 606 F.2d 884, 886 n.1 (9th Cir. 1979), cert. denied, 444 U.S. 1024 (1980); United States v. Wedelstedt, 589 F.2d 338, 341-342 (8th Cir. 1978), cert. denied, 442 U.S. 916 (1979); United States v. James, 528 F.2d 999, 1014 (5th Cir.), cert. denied, 429 U.S. 959 (1976).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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JANUARY 1991

No. 90-6352

In The

Supreme Court of the United States

October Term, 1990

DIANE GRIFFIN,

Petitioner,

vs.

UNITED STATES,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

JOINT APPENDIX

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Petition For Certiorari Filed November 27, 1990
Certiorari Granted February 19, 1991

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RELEVANT DOCKET ENTRIES

02/10/88	Filed indictment
	Order own recognizance bail set in the amount of $4,500.00
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	Defendant enters plea of not guilty
06/09/88	Voir dire begins-jury
06/15/88	Motion by government to quash subpoenas granted
6/15/88-7/18/88	Jury Trial
07/05/88	Motion for mistrial filed
07/08/88	Filed Defendant's proposed special interrogatories.
	Hearing held (jury instruction conference.)
07/18/88	Jury verdict of guilty (Count 20)
	Court judgment of guilty (Count 20)
08/18/88	Motion for judgment of acquittal filed
	Motion for new trial filed
09/23/88	Order filed (Sentencing hearing held.) (JUDGE WILLIAMS)
	Motion for judgment of acquittal denied
	Motion for new trial denied
	Motion made in open court for bail pending appeal
	Sentencing of defendant (Count 20)
	Filed notice of appeal (Count 20)
10/05/88	Issued judgment and commitment to U.S. Marshal (Count 20).

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA)
)
v.)
)
ALEX BEVERLY,)
also known as Sticks,)
GEORGE BROWN,)
also known as Wes,)
BETTY McNULTY,)
JOSEPH McCORKLE,)
also known as Old Man Joe,)
CHARLES AVANT,)
also known as Darling Charles, and)
DIANE GRIFFIN)

COUNT ONE

1. From at least in or about mid-1980 through and including the date of this indictment, at Chicago, in the Northern District of Illinois, Eastern Division,

ALEX BEVERLY,
also known as Sticks,
GEORGE BROWN,
also known as Wes,
BETTY McNULTY,
JOSEPH McCORKLE,
also known as Old Man Joe, and
CHARLES AVANT,
also known as Darling Charles,

defendants herein, did conspire with each other and others, known and unknown to the Grand Jury, to knowingly and intentionally possess with intent to distribute and to distribute heroin, a Schedule I Narcotic Drug

Controlled Substance, and cocaine, a Schedule II Narcotic Drug Controlled Substance, in violation of Title 21, United States Code, Section 841(a)(1) and, to knowingly and intentionally use and cause to be used, communications facilities namely the telephone and digital pagers, in committing, causing the facilitating the commission of violations of Title 21, United States Code, Sections 841(a) and 846, namely the unlawful possession with intent to distribute and distribution of heroin and cocaine and attempting and conspiring to commit those offenses, which are felonies, in violation of Title 21, United States Code, Section 843(b).

2. It was part of the conspiracy that defendants ALEX BEVERLY, also known as Sticks, GEORGE BROWN, also known as Wes, BETTY McNULTY, JOSEPH McCORKLE, also known as Old Man Joe and CHARLES AVANT, also known as Darling Charles possessed with the intent to distribute quantities of mixtures contain heroin and cocaine.

3. It was further part of the conspiracy that defendants ALEX BEVERLY, also known as Sticks, GEORGE BROWN, also known as Wes, BETTY McNULTY, JOSEPH McCORKLE, also known as Old Man Joe and CHARLES AVANT, also known as Darling Charles, distributed and caused to be distributed quantities of mixtures containing heroin and cocaine.

4. It was further part of the conspiracy that defendants ALEX BEVERLY, also known as Sticks and BETTY McNULTY, owned and operated properties and businesses which were used to commit and to facilitate the commission of violations of Title 21, United States Code,

Sections 841(a)(1) and 846, namely the unlawful possession with the attempt to distribute and the distribution of heroin and cocaine and attempting and conspiring to commit those offenses. These properties and businesses include, but are not limited to:

a. Blacom, Inc., 3853-55 W. Ogden Chicago, Illinois

b. Blacon Liquors and Food, 3859 W. Ogden, Chicago, Illinois

c. Blacon II Food and Liquor Store, 745 S. California, Chicago, Illinois

d. Blacon Food and Liquor Store, 1454-56 S. Pulaski, Chicago, Illinois

e. Tit's Cocktail Lounge, 1454-56 S. Pulaski, Chicago, Illinois

f. Somon's Lounge, 5401-03 W. Madison, Chicago, Illinois

g. Mercedes Lounge, formerly Somon's Lounge, 5304 W. Madison, Chicago, Illinois

h. Noonies Lounge, formerly Mercedes Lounge, 3853-55 W. Ogden, Chicago, Illinois

i. 1811 S. Harding, Chicago, Illinois

5. It was further part of the conspiracy that defendants ALEX BEVERLY, also known as Sticks, GEORGE BROWN, also known as Wes, BETTY McNULTY and CHARLES AVANT, also known as Darling Charles, conducted narcotics transactions and had conversations concerning narcotics transactions in the above described properties and businesses.

6. It was further part of the conspiracy that defendants ALEX BEVERLY, also known as Sticks, GEORGE

BROWN, also known as Wes, and BETTY McNULTY, used telephones located in the above described properties and business to discuss, facilitate, and arrange narcotics transactions. Defendants ALEX BEVERLY, also known as Sticks also obtained and used digital pagers for the purpose of communicating concerning narcotics transactions.

7. It was further part of the conspiracy that defendants ALEX BEVERLY, also known as Sticks, and BETTY McNULTY used the above described properties and businesses to hide and conceal the unlawful proceeds of narcotics transactions.

8. It was further part of the conspiracy that on or about March 26, 1986, April 2, 1986, and June 25, 1986, Willie Jordan, also known as Jim Dandy, distributed quantities of mixtures containing heroin.

9. It was further part of the conspiracy that on or about May 2, 1986, defendants ALEX BEVERLY, also known as Sticks, and CHARLES AVANT, also known as Darling Charles, distributed a quantity of a mixture containing heroin.

10. It was further part of the conspiracy that on or about April 13, 1986, May 17, 1986, June 22, 1986, July 6, 1986, July 20, 1986, August 9, 1986, August 23, 1986, September 22, 1986, October 17, 1986 and November 1, 1986, defendants ALEX BEVERLY, also known as Sticks, and GEORGE BROWN, also known as Wes, purchased kilogram quantities of mixtures containing cocaine and possessed said mixtures with the intent to distribute them.

11. It was further part of the conspiracy that on or about May 3, 1986, defendants ALEX BEVERLY, also known as Sticks, and JOSEPH McCORKLE, also known as Old Man Joe, travelled from Chicago to Mobile, Alabama for the purpose of purchasing two kilograms of cocaine.

12. It was further part of the conspiracy that on or about August 12, 1986, Willie Jordan, also known as Jim Dandy, provided defendant BETTY McNULTY with a quantity of a mixture containing cocaine, which she then distributed.

13. It was further part of the conspiracy that on about August 27, 1986 defendant BETTY McNULTY distributed a quantity of a mixture containing cocaine.

14. It was further part of the conspiracy that on or about September 30, 1986, defendant ALEX BEVERLY, also known as Sticks, travelled to Miami, Florida and while there promoted and facilitated the promotion of his cocaine distribution business by making payments for cocaine he had previously purchased.

15. It was further part of the conspiracy that on or about November 6, 1986, defendant JOSEPH McCORKLE, also known as Old Man Joe, travelled from Chicago, Illinois to Miami, Florida for the purpose of purchasing a kilogram of cocaine.

16. It was further part of the conspiracy that defendants ALEX BEVERLY, also known as Sticks, GEORGE BROWN, also known as Wes, and BEVERLY McNULTY obtained substantial profits from the distribution of heroin and cocaine.

17. It was further of the conspiracy that defendants misrepresented, concealed and hid and caused to be misrepresented, concealed and hidden the purposes of and the acts done in furtherance of the conspiracy and used coded language, surveillance and counter surveillance techniques, and other means to avoid detection by law enforcement authorities and to otherwise provide security to the members of the conspiracy.

In violation of Title 21, United States Code, Section 846.

COUNT TWO

On or about April 13, 1986, at Chicago, in the Northern District of Illinois, Eastern Division,

ALEX BEVERLY,
also known as Sticks, and
GEORGE BROWN,
also known as Wes,

defendants herein, knowingly and intentionally did possess with intent to distribute approximately 500 grams of a mixture containing cocaine, a Schedule II Narcotic Drug Controlled Substance;

In violation of Title 21, United States Code, Section 841(a)(1).

COUNT THREE

On or about May 2, 1986, at Chicago, in the Northern District of Illinois, Eastern Division,

ALEX BEVERLY,
also known as Sticks and
CHARLES AVANT,
also known as Darling Charles,

defendants herein, knowingly and intentionally did distribute approximately 75.95 grams of a mixture containing heroin, a Schedule I Narcotic Drug Controlled Substance;

In violation of Title 21, United States Code, Section 841(a)(1).

COUNT FOUR

On or about May 3, 1986, at Chicago, in the Northern District of Illinois, Eastern Division, and elsewhere,

ALEX BEVERLY,
also known as Sticks, and
JOSEPH McCORKLE,
also known as Old Man Joe,

defendants herein, did travel from Chicago, Illinois, to Mobile, Alabama with intent to promote, manage, establish, carry on, and facilitate the promotion, management, establishment, and carrying on of an unlawful activity, namely, a business enterprise involving the following narcotics and controlled substances offenses: violations of Title 21, United States Code, Sections 841(a)(1) and 846, the possession with intent to distribute and distribution of cocaine and, attempting and conspiring to commit such offenses; and thereafter, the defendants,

ALEX BEVERLY,
also known as Sticks, and
JOSEPH McCORKLE,
also known as Old Man Joe,

did perform and attempt to perform acts to promote, manage, establish, and carry on and facilitate the promotion, management, establishment, and carrying on of said unlawful activity;

In violation of Title 18, United States Code, Section 1952.

COUNT FIVE

On or about May 17, 1986, at Chicago, in the Northern District of Illinois, Eastern Division,

ALEX BEVERLY,
also known as Sticks, and
GEORGE BROWN,
also known as Wes,

defendants herein, knowingly and intentionally did possess with intent to distribute approximately 1000 grams of a mixture containing cocaine, a Schedule II Narcotic Drug Controlled Substance;

In violation of Title 21, United States Code, Section 841(a)(1).

COUNT SIX

On or about June 22, 1986, at Chicago, in the Northern District of Illinois, Eastern Division,

ALEX BEVERLY,
also known as Sticks, and
GEORGE BROWN,
also known as Wes,

defendants herein, knowingly and intentionally did possess with intent to distribute approximately 1000 grams of a mixture containing cocaine, a Schedule II Narcotic Drug Controlled Substance;

In violation of Title 21, United States Code, Section 841(a)(1).

COUNT SEVEN

On or about July 6, 1986, at Chicago, in the Northern District of Illinois, Eastern Division,

ALEX BEVERLY,
also known as Sticks, and
GEORGE BROWN,
also known as Wes,

defendants herein, knowingly and intentionally did possess with intent to distribute approximately 1000 grams of a mixture containing cocaine, a Schedule II Narcotic Drug Controlled Substance;

In violation of Title 21, United States Code, Section 841(a)(1).

COUNT EIGHT

On or about July 20, 1986, at Chicago, in the Northern District of Illinois, Eastern Division,

ALEX BEVERLY,
also known as Sticks, and
GEORGE BROWN,
also known as Wes,

defendants herein, knowingly and intentionally did possess with intent to distribute approximately 1000 grams of a mixture containing cocaine, a Schedule II Narcotic Drug Controlled Substance;

In violation of Title 21, United States Code, Section 841(a)(1).

COUNT NINE

On or about August 9, 1986, at Chicago, in the Northern District of Illinois, Eastern Division,

ALEX BEVERLY,
also known as Sticks, and
GEORGE BROWN,
also known as Wes,

defendants herein, knowingly and intentionally did possess with intent to distribute approximately 1000 grams of a mixture containing cocaine, a Schedule II Narcotic Drug Controlled Substance;

In violation of Title 21, United States Code, Section 841(a)(1).

COUNT TEN

On or about August 11, 1986, at 12:00 p.m., at Chicago, in the Northern District of Illinois, Eastern Division,

BETTY McNULTY,

defendant herein, knowingly and intentionally did use a communication facility, namely a telephone, in a telephone call from Chicago to Chicago, in committing and in causing and facilitating the commission of felony violations of Title 21, United States Code, Sections 841(a)(1) and 846, namely the possession with intent to distribute and distribution of cocaine, attempting to commit such offenses and conspiring to commit such offenses, as charged in Count One;

In violation of Title 21, United States Code, Section 843(b).

COUNT ELEVEN

On or about August 12, 1986, at 11:15 p.m., at Chicago, in the Northern District of Illinois, Eastern Division,

BETTY McNULTY,

defendant herein, knowingly and intentionally did use a communication facility, namely a telephone, in a telephone call from Chicago to Chicago, in committing and in causing and facilitating the commission of felony violations of Title 21, United States Code, Sections 841(a)(1) and 846, namely the possession with intent to distribute and distribution of cocaine, attempting to commit such offenses and conspiring to commit such offenses, as charged in Count One;

In violation of Title 21, United States Code, Section 843(b).

COUNT TWELVE

On or about August 12, 1986, at Chicago, in the Northern District of Illinois, Eastern Division,

BETTY McNULTY,

defendant herein, knowingly and intentionally did distribute approximately 13.05 grams of a mixture containing cocaine, a Schedule II Narcotic Drug Controlled Substance;

In violation of Title 21, United States Code, Section 841(a)(1).

COUNT THIRTEEN

On or about August 23, 1986, at Chicago, in the Northern District of Illinois, Eastern Division,

ALEX BEVERLY,
also known as Sticks, and
GEORGE BROWN,
also known as Wes,

defendants herein, knowingly and intentionally did possess with intent to distribute approximately 1000 grams of a mixture containing cocaine, a Schedule II Narcotic Drug Controlled Substance;

In violation of Title 21, United States Code, Section 841(a)(1).

COUNT FOURTEEN

On or about August 27, 1986, at Chicago, in the Northern District of Illinois, Eastern Division,

BETTY McNULTY,

defendant herein, knowingly and intentionally did distribute approximately 27.70 grams of a mixture containing cocaine, a Schedule II Narcotic Drug Controlled Substance;

In violation of Title 21, United States Code, Section 841(a)(1).

COUNT FIFTEEN

On or about September 22, 1986, at Chicago, in the Northern District of Illinois, Eastern Division,

ALEX BEVERLY,
also known as Sticks, and
GEORGE BROWN,
also known as Wes,

defendants herein, knowingly and intentionally did possess with intent to distribute approximately 1000 grams of a mixture containing cocaine, a Schedule II Narcotic Drug Controlled Substance;

In violation of Title 21, United States Code, Section 841(a)(1).

COUNT SIXTEEN

On or about September 30, 1986, at Chicago, in the Northern District of Illinois, Eastern Division, and elsewhere,

ALEX BEVERLY,
also known as Sticks,

defendant herein, did travel from Chicago, Illinois, to Miami, Florida with intent to promote, manage, establish, carry on, and facilitate the promotion, management, establishment, and carrying on of an unlawful activity, namely, a business enterprise involving the following narcotics and controlled substances offenses: violations of Title 21, United States Code, Sections 841(a)(1) and 846, the possession with intent to distribute and distribution of cocaine and, attempting and conspiring to commit such offenses; and thereafter, the defendant,

ALEX BEVERLY,
also known as Sticks,

did perform and attempt to perform acts to promote, manage, establish, and carry on and facilitate the promotion, management, establishment, and carrying on of said unlawful activity;

In violation of Title 18, United States Code, Section 1952.

COUNT SEVENTEEN

On or about October 17, 1986, at Chicago, in the Northern District of Illinois, Eastern Division,

ALEX BEVERLY,
also known as Sticks, and
GEORGE BROWN,
also known as Wes,

defendants herein, knowingly and intentionally did possess with intent to distribute approximately 1000 grams of a mixture containing cocaine, a Schedule II Narcotic Drug Controlled Substance;

In violation of Title 21, United States Code, Section 841(a)(1).

COUNT EIGHTEEN

On or about November 1, 1986, at Chicago, in the Northern District of Illinois, Eastern Division,

ALEX BEVERLY,
also known as Sticks, and
GEORGE BROWN,
also known as Wes,

defendants herein, knowingly and intentionally did possess with intent to distribute approximately 1000 grams of a mixture containing cocaine, a Schedule II Narcotic Drug Controlled Substance;

In violation of Title 21, United States Code, Section 841(a)(1).

COUNT NINETEEN

On or about November 6, 1986, at Chicago, in the Northern District of Illinois, Eastern Division, and elsewhere,

JOSEPH McCORKLE,
also known as Old Man Joe,

defendant herein, did travel from Chicago, Illinois, to Miami, Florida with intent to promote, manage, establish, carry on, and facilitate the promotion, management, establishment, and carrying on of an unlawful activity, namely, a business enterprise involving the following narcotics and controlled substances offenses: violations of Title 21, United States Code, Sections 841(a)(1) and 846, the possession with intent to distribute and distribution of cocaine and, attempting and conspiring to commit such offenses; and thereafter, the defendant,

JOSEPH McCORKLE,
also known as Old Man Joe,

did perform and attempt to perform acts to promote, manage, establish, and carry on and facilitate the promotion, management, establishment, and carrying on of said unlawful activity;

In violation of Title 18, United States Code, Section 1952.

COUNT TWENTY

1. The Grand Jury realleges and incorporates by reference herein paragraphs 1 through 17 of Count One and paragraphs 1 and 2 of Count Twenty-Three.

2. From at least in or about early 1982, the exact date being unknown, through and including the date of this indictment, at Chicago, in the Northern District of Illinois, Eastern Division,

ALEX BEVERLY,
also known as Sticks,
BETTY McNULTY, and
DIANE GRIFFIN,

defendants herein, did knowingly combine, conspire, confederate, and agree together and with others known and unknown to the Grand Jury to defraud the United States by impeding, impairing, obstructing and defeating the lawful functions of the Department of the Treasury, in particular, the Internal Revenue Service, in the ascertainment, computation, assessment and collection of the revenue: to wit, income taxes, and by impeding, impairing, obstructing and defeating the lawful functions of the Department of Justice, in particular the Drug Enforcement Administration, in the ascertainment of forfeitable assets.

3. It was part of the conspiracy that defendants BETTY McNULTY and DIANE GRIFFIN would assist defendant ALEX BEVERLY, also known as Sticks, in concealing from the Internal Revenue Service, the Drug Enforcement Administration and other law enforcement agencies, income and assets obtained by him with proceeds of illegal distribution of narcotics, by acting as nominees and having real properties, money, cars and businesses which were purchased, owned and controlled by defendant ALEX BEVERLY, also known as Sticks, placed in their names.

4. It was further part of the conspiracy that defendants BETTY McNULTY and DIANE GRIFFIN acted as nominee or straw owners of real and personal property purchased by ALEX BEVERLY in order to conceal his interest in said property.

5. It was further part of the conspiracy that in or about February 1985, Blacom, Inc. was organized and incorporated under the laws of the State of Illinois for the purpose of serving as a holding company for retail businesses and real properties owned by defendant ALEX BEVERLY, also known as Sticks. At the time of incorporation, another individual, who made no investment in the corporation and had no control and authority over and involvement in the corporation's activities, was named in the Articles of Incorporation as the sole shareholder, director and officer.

6. It was further part of the conspiracy that defendants ALEX BEVERLY, also known as Sticks, and BETTY McNULTY, placed titles to real estate purchased by ALEX BEVERLY, also known as Sticks, in the name of BETTY McNULTY.

7. It was further part of the conspiracy that defendants ALEX BEVERLY, also known as Sticks, and BETTY McNULTY, transferred and caused to be transferred real property purchased by ALEX BEVERLY, also known as Sticks, into land trusts the beneficial interests of which were held by defendant DIANE GRIFFIN and Blacom Corporation.

8. It was further part of the conspiracy that on or about March 18, 1984 and April 17, 1986, defendant DIANE GRIFFIN signed, filed and caused to be filed

United States Individual Income Tax Returns for the years 1983, 1984 and 1985 which returns falsely stated that she was the owner of Tits Lounge, 1454 South Pulaski, Chicago, Illinois.

9. It was further part of the conspiracy that on or about November 25, 1986, defendant BETTY McNULTY signed, filed and caused to be filed a United Individual Income Tax Return for the year 1985 which return falsely stated that she was the owner of Blacon Food and Liquor, 3859 West Ogden, Chicago, Illinois and Somon's, 5304 West Madison Street, Chicago, Illinois.

10. It was further part of the conspiracy that on or about November 28, 1986, defendant BETTY McNULTY signed and filed and caused to be filed a United States Corporation Income Tax Return for Blacom, Inc. for the fiscal year May 1, 1985 through April 30, 1986, which return falsely stated that she was a sixty percent shareholder of the corporation and that four other individuals were each ten percent shareholders. All of the shareholders were nominees for defendant ALEX BEVERLY, also known as Sticks, who at all times material to this indictment owned and controlled Blacom, Inc. and its businesses.

11. It was further part of the conspiracy that defendants ALEX BEVERLY, also known as Sticks, BETTY McNULTY and DIANE GRIFFIN placed and caused to be placed, titles to luxury cars including a 1983 Mercedes and a 1986 Jaguar, purchased and owned by defendant ALEX BEVERLY, also known as Sticks, in the names of defendants BETTY McNULTY and DIANE GRIFFIN.

12. It was further part of the conspiracy that defendant BETTY McNULTY used a bank account in her name at the Pioneer Bank, Chicago, Illinois, to pay for items purchased by defendant ALEX BEVERLY, also known as Sticks, with money obtained from defendant ALEX BEVERLY, also known as Sticks.

Overt Acts

13. In furtherance of the conspiracy and to effect the objects thereof, the defendants committed the following overt acts.

a. On or about August 30, 1983, Defendant DIANE GRIFFIN, became the beneficiary of LaSalle National Bank Trust No. 10-4346-08.

b. On or about March 18, 1984, defendant DIANE GRIFFIN, signed and filed and caused to be filed a false Untied States Individual Income Tax Return for the year 1983.

c. On or about January 17, 1985 defendant BETTY McNAULTY [sic], signed a deed transferring title of a property located at 1812 S. Millard, Chicago, Illinois to LaSalle National Bank Trust No. 10-4346-08.

d. On or about January 17, 1985, defendant BETTY McNULTY, signed a deed transferring the title of a property located at 1811 S. Harding, Chicago, Illinois to LaSalle National Bank, Trust No. 10-4346-08.

e. On or about January 17, 1985 defendant ALEX BEVERLY, also known as Sticks, transferred title of property located at 5436-38 W. Division, Chicago, Illinois, to LaSalle National Bank Trust No. 10-4346-08.

f. On or about July 1, 1985 defendant ALEX BEVERLY, also known as Sticks, transferred title of property located at 1456 South Pulaski, Chicago, Illinois to Diane Smith.

g. On or about December 27, 1985 defendant BETTY McNULTY, signed a real estate contract for the purchase of property located at 5401-03 West Madison, Chicago, Illinois.

h. On or about January 3, 1986 defendants ALEX BEVERLY, also known as Sticks, and BETTY McNULTY had a meeting at which BEVERLY directed the distribution of shares of Blacom, Inc. stock and appointed officers of the corporation.

i. On or about July 15, 1986 defendant BETTY McNULTY, signed and received a State of Illinois registration card for a 1983 grey Mercedes Benz 300 series four door sedan.

j. On or about November 17, 1986 defendant BETTY McNULTY, signed, and filed and caused to be filed a United States Individual Income Tax Return for the year 1985.

k. On or about November 28, 1986 defendant BETTY McNULTY, signed and filed and caused to be filed a United States Corporation Income Tax Return for Blacom, for the fiscal year May 1, 1985 through April 30, 1986.

In violation of Title 18, United States Code, Section 371.

COUNT TWENTY-ONE

1. During the calendar year 1985 defendant ALEX BEVERLY, also known as Sticks, a resident of Chicago, Illinois had and received an adjusted gross income of approximately $59,481 and had a taxable income of approximately $56,395.

2. Upon said taxable income defendant ALEX BEVERLY, also known as Sticks, owed to the United States of America income tax of approximately $20,958.

3. Defendant ALEX BEVERLY, also known as Sticks, was required by law to make an income tax return to the Internal Revenue Service and to pay such tax on or before April 15, 1986.

4. Well knowing the foregoing facts, beginning on January 1, 1985 and continuing thereafter until the date of this indictment, in the Northern District of Illinois, Eastern Division,

ALEX BEVERLY,
also known as Sticks,

defendant herein, did willfully and knowingly attempt to evade and defeat said income tax due and owing to the United States for said calendar year by many and diverse acts including:

(a) failing to make such income tax return on or before April 15, 1986 to the Internal Revenue Service and by failing to pay said income tax due and owing to the Internal Revenue Service; and

(b) using cash and making records with the intention of concealing the true amount of his taxable income; and

(c) hiding and concealing his assets and income by placing property he purchased, owned and controlled in the names of others; and

(d) paragraphs 1 through 13 of Count Twenty are realleged and incorporated as though fully set forth herein.

In violation of Title 26, United States Code, Section 7201.

COUNT TWENTY-TWO

1. During the calendar year 1986 defendant ALEX BEVERLY, also known as Sticks, a resident of Chicago, Illinois had and received an adjusted gross income in excess of $224,500 and had a taxable income of at least $223,417.

2. Upon said taxable income defendant ALEX BEVERLY, also known as Sticks, owed to the United States of America substantial income tax.

3. Defendant ALEX BEVERLY, also known as Sticks, was required by law to make an income tax return to the Internal Revenue Service and to pay such tax on or before April 15, 1987.

4. Well knowing the foregoing facts, beginning on January 1, 1986 and continuing thereafter until the date of this indictment, in the Northern District of Illinois, Eastern Division,

ALEX BEVERLY,
also known as Sticks,

defendant herein, did wilfully and knowinly [sic] attempt to evade and defeat said income tax due and owing to the

United States for said calendar year by many and diverse acts including:

(a) failing to make such income tax return on or before April 15, 1987 to the Internal Revenue Service and by failing to pay said income tax due and owing to the Internal Revenue Service; and

(b) using cash and making records with the intention of concealing the true amount of his taxable income; and

(c) hiding and concealing his assets and income by placing property he purchased, owned and controlled in the names of others; and

(d) paragraphs 1 through 13 of Count Twenty are realleged and incorporated as though fully set forth herein.

In violation of Title 26, United States Code, Section 7201.

COUNT TWENTY-THREE

1. From in or about 1978 through and including the date of this indictment, at Chicago, in the Northern District of Illinois, Eastern Division, and elsewhere,

ALEX BEVERLY,
also known as Sticks,

defendant herein, did engage in a continuing criminal enterprise by committing a continuing series of felony violations of Sections 841, 843(b), and 846 of Title 21, United States Code, which continuing series of violations was undertaken by defendant in concert with at least five

other persons with respect to whom defendant occupied a position of organizer, a supervisory position, and other positions of management, and from which continuing series of violations defendant obtained substantial income and resources.

2. The continuing series of violations undertaken by defendant ALEX BEVERLY, also known as Sticks, includes but is not limited to:

(a) From in or about 1978 through and including the date of this indictment, at Chicago, in the Northern District of Illinois, Eastern Division, and elsewhere, on thirteen occasions, defendant ALEX BEVERLY, also known as Sticks, knowingly and intentionally distributed heroin and cocaine and possessed heroin and cocaine with the intent to distribute it in violation of Title 21, United States Code, Section 841(a)(1).

(b) Violation of Title 21, United States Code, Section 846, as set forth in Count One of this Indictment, which is realleged as though fully set forth here.

In violation of Title 21, United States Code, Section 848.

FORFEITURE ALLEGATIONS

1. The Grand Jury realleges Counts One through Twenty-Three of this indictment as though fully set forth herein.

2. The Grand Jury further charges that from mid-1980 through and including the date of this indictment, defendants ALEX BEVERLY, also known as Sticks, GEORGE BROWN, also known as Wes, BETTY

McNULTY, JOSEPH McCORKLE, also known as Old Man Joe, and CHARLES AVANT, also known as Darling Charles, did engage in conduct in violation of Title 21, United States Code, Sections 841(a)(1), 843, 846, and 848, thereby subjecting to forfeiture to the United States, pursuant to Title 21, United States Code, Section 853(a), the following property and interests:

a. All property constituting or derived from any proceeds the defendants obtained, directly or indirectly as a result of their violations of Title 21, United States Code, Sections 841(a)(1), 843(b), 846, and 848;

b. All of the defendants' property used and intended to be used in any manner or part to commit or to facilitate the commission of, their violations of Title 21, United States Code, Sections 841(a)(1), 843(b), 846 and 848; and

c. All of defendant ALEX BEVERLY's interests in, claims against or property or contractual rights of any kind affording a source of influence over his continuing criminal enterprise.

Specifically, this includes the following:

i. The property commonly known as 3853-55 West Ogden Boulevard, Chicago, Illinois, and identified as:

> Lots 21 and 22 in Block 1 in Ogden Boulevard Addition to Chicago, being a Subdivision of that part of the East 1/2 of the West 1/2 of the Northwest 1/4 of Section 26, lying North of the Chicago Burlington and Quincy Railroad, together with that part South of Ogden Avenue, of the East 1/2 of the West 1/2 of the Southwest 1/4 of Section 23, Township 39 North, Range 13 East of the Third Principal Meridian, in Cook County, Illinois.

ii. The property commonly known as 1454-56 South Pulaski, Chicago, Illinois, and further identified as:

> Lots 12 and 13 in Block 1 in Our Home Addition to Chicago being a Subdivision of the East one-half of the North East one-quarter of Section 22, Township 39 North, Range 13, East of the Third Principal Meridian, (except the North 50 acres thereof) in Cook County, Illinois.

iii. The property commonly known as 5401-03 West Madison, Chicago, Illinois, and further identified as:

> The West 2 inches of North 65 feet of Lot 5 and West 6 inches of South 65 feet of Lot 5 and all of Lots 6 and 7 in Subdivision of Lot 126 of School Trustee's Subdivision in North part of Sectin [sic] 16, Township 39 North, Range 13 East of the third principal meridian, in Cook County, Illinois.

iv. The property commonly known as 745 South California, Chicago, Illinois, and further identified as:

> Lot 23 in Block 1 in A. J. Alexander's Addition to Chicago, being a subdivision of the North 1/2 and South East 1/4 both of the South West 1/4 of the North West of the South east 1/4 of Section 13, Township 39 North, Range 13, East of the Third Principal Meridian in Cook County, Illinois.

v. The property commonly known as 5436-38 West Division, Chicago, Illinois, and further identified as:

> Lot 14 in Block 8 in Channing M. Coleman's Addition to Austin, being a subdivision of the West 26.82 acres of the S 1/2 of the 1/4 of Section 4, Township 39, Range 13 East of the Third Principal Meridian in Cook County, Illinois.

vi. The property commonly known as 1811 South Harding and further identified as:

> Lot 50 in Block 5 in Moore's Subdivision of Lot 1, in the Sueprior [sic] Court Partition of the West 60 acres, North of the South Western Plan Road of the Southwest 1/4 quarter of Section 23, Township 39 North, Range 13 East of the Third Principal Meridian in Cook County, Illinois.

vii. The property commonly known as 1812 South Millard, Chicago, Illinois and further identified as:

> Lot 4 in Block 3 in Resubdivision of Blocks 1 to 5 and vacated alley Lansingh's second addition to Chicago being a Subdivision in the South West 1/4 of Section 23, Township 39 North, Range 13 East of the Third Principal Meridian, in Cook County, Illinois.

viii. The property commonly known as 1801-07 South Lawndale, Chicago, Illinois and further described as:

> Lots 171, 172, 173 and 174 in Lansigh's Addition to Chicago a Subdivision of Lots 5, 6, 15 and 16 and the West 146.17 feet of Lots 4 and 17 in J. H. Kedzie's Subdivision in the Southwest Quarter of Section 23, Township 39 North, Range 13, East of the Third Principal Meridian, in Cook County, Illinois.

ix. All assets of the business known as Blacon Liquors and Food, 3859 West Ogden, Chicago, Illinois including but not limited to inventory, equipment and trade fixtures.

x. All assets of the business known as Blacon II Food and Liquor Store, 745 South California, Chicago,

Illinois, including but not limited to inventory, equipment and trade fixtures.

xi. All assets of the business known as Blacon Food and Liquors, 1454-1456 South Pulaski, Chicago, Illinois, including but not limited to inventory, equipment, and trade fixtures.

xii. All assets of the business known as Tit's Cocktail Lounge, 1454-56 South Pulaski, Chicago, Illinois, including but not limited to inventory, equipment and trade fixtures.

xiii. All assets of the business known as Mercedes Lounge, 5304 West Madison, Chicago, Illinois, including but not limited to inventory, equipment and trade fixtures.

xiv. All assets of the business known as Somon's Lounge, 5401-03 West Madison, Chicaog [sic], Illinois, including but lnot [sic] limited to inventory, equipment and trade fixtures.

GOVERNMENT INSTRUCTION NO. 20

21 U.S.C. § 846, 18 U.S.C. § 371

In Count One of the indictment, defendants Alex Beverly, George Brown, Joseph McCorkle and Betty McNulty are charged with the crime of conspiracy to possess with intent to distribute and to distribute cocaine and heroin and to use the telephone to facilitate federal narcotics offenses. Title 21, United States Code, Section 846, provides in pertinent part:

> Any person who . . . conspires to [possess with intent to distribute or to distribute controlled substances or to use the telephone to facilitate federal narcotics offenses]

shall be guilty of a crime.

In Count Twenty of the indictment, defendants Alex Beverly, Betty McNulty and Anne [Diane] Griffin are charged with conspiracy to impede the lawful functions of the Internal Revenue Service and the Drug Enforcement Administration. Title 18, United States Code, Section 371, provides in pertinent part:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be –

guilty of a crime.

GOVERNMENT INSTRUCTION NO. 21

Seventh Circuit Committee (1980) 5.11
Bourjaily v. United States, 107 S.Ct. 2775(1987)

In order to establish the offense of conspiracy as charged in Count Twenty the government must prove these elements beyond a reasonable doubt:

1. that the alleged conspiracy existed, and
2. that an overt act was committed in furtherance of the conspiracy, and
3. that the defendant knowingly and intentionally became a member of the conspiracy.

If you find from your consideration of all the evidence in the case that all of these propositions have been proved beyond a reasonable doubt, then you should find the defendant you are considering guilty.

If, on the other hand, you find from your consideration of all the evidence that any of these propositions has not been proved beyond a reasonable doubt, then you should find the defendant you are considering not guilty.

A conspiracy is a combination of two or more persons to accomplish an unlawful purpose. A conspiracy may be established even if its purpose was not accomplished.

In determining whether the alleged conspiracy existed, you may consider the actions and statements of all the alleged participants. The agreement may be inferred from all the circumstances and the conduct of all the alleged participants.

With respect to the conspiracy charged in Count Twenty only, the government must prove that at least one

overt act was committed by at least one conspirator to further the purpose of the conspiracy. It is not necessary that all the overt acts charged in the indictment be proved, and the overt act proved may itself be a lawful act.

In determining whether a defendant became a member of the conspiracy you may consider the acts and statements of that particular defendant. You may also consider the acts and statements of the other alleged conspirators which were made during the course of the alleged conspiracy, as bearing on the question of a defendant's membership in the alleged conspiracy.

To be a member of the conspiracy, a defendant need not join at the beginning or know all the other members or the means by which the purpose was to be accomplished. The government must prove beyond a reasonable doubt, from the defendant's own acts and statements, that he or she was aware of the common purpose and was a willing participant.

Defendant Griffin's Instruction No. 1A
Seventh Circuit Committee (1980) 5.11
Bourjaily v. United States, 107 S.Ct. 2775 (1987)
Ingram v. United States, 360 U.S. 672, 79 S.Ct. 1314, 3 L.Ed.2d 1503 (1959)
United States v. Krasovich, 819 F.2d 253 (9th Cir. 1987)
United States v. Velasquez, 772 F.2d 1348 (1985)

In order to establish the offense of conspiracy as charged in Count Twenty the government must prove these elements beyond a reasonable doubt:

1. that the alleged conspiracy existed, and
2. that an overt act was committed in furtherance of the conspiracy, and
3. that the defendant knowingly and intentionally became a member of the conspiracy, and
4. that the defendant knew that the objective of the conspiracy was to to [sic] defraud the United States by impeding, impairing, obstructing and defeating the lawful functions of the Department of Justice, in particular the Drug Enforcement Administration, in the ascertainment of forfeitable assets of Alex Beverly or that the defendant knew that the objective of the conspiracy was to defraud the United States by impeding, impairing, obstructing and defeating the lawful functions of the Department of the Treasury, in particular, the Internal Revenue Service, in the ascertainment, computation, assessment and collection of the revenue generated by Alex Beverly.

If you find from your consideration of all the evidence in the case that all of these propositions have been proved beyond a reasonable doubt, then you should find the defendant you are considering guilty.

If, on the other hand, you find from your consideration of all the evidence that any of these propositions has not been proved beyond a reasonable doubt, then you should find the defendant you are considering not guilty.

A conspiracy is a combination of two or more persons to accomplish an unlawful purpose. A conspiracy may be established even if its purpose was not accomplished.

In determining whether the alleged conspiracy existed, you may consider the actions and statements of all the alleged participants. The agreement may be inferred from all the circumstances and the conduct of all the alleged participants.

With respect to the conspiracy charged in Count Twenty only, the government must prove that at least one overt act was committed by at least one conspirator to further the purpose of the conspiracy. It is not necessary that all the avert acts charged in the indictment be proved, and the overt act proved may itself be a lawful act.

In determining whether a defendant became a member of the conspiracy you may consider the acts and statements of that particular defendant. You may also consider the acts and statements of the other alleged conspirators which were made during the course of the alleged conspiracy, as bearing on the question of a defendant's membership in the alleged conspiracy.

To be a member of the conspiracy, a defendant need not join at the beginning or know all the other members

or the means by which the purpose was to be accomplished. The government must prove beyond a reasonable doubt, from the defendant's own acts and statements, that he or she was aware of the common purpose and was a willing participant.

Defendant Griffin's Special Interrogatory 1

Special Interrogatory No. 6: Did Diane Griffin have knowledge that the objective of the conspiracy charged in count 20 of the indictment was to defraud the United States by impeding, impairing, obstructing and defeating the lawful functions of the Department of Justice, in particular the Drug Enforcement Administration, in the ascertainment of forfeitable assets of Alex Beverly?

___ Yes

___ No

Dissenting jurors, if any: _____

Defendant Griffin's Special Interrogatory No. 2

Special Interrogatory No. 7: Did Diane Griffin have knowledge that the objective of the conspiracy charged in count 20 of the indictment was to defraud the United States by impeding, impairing, obstructing and defeating the lawful functions of the Department of the Treasury, in particular the Internal Revenue Service, in the ascertainment, computation, assessment and collection of the revenue generated by Alex Beverly?

___ Yes

___ No

Dissenting jurors, if any:

Defendant Griffin's Instruction No. 4A
Seventh Circuit Committee (1980) 5.11
Bourjaily v. United States, 107 S.Ct. 2775 (1987)
Ingram v. United States, 360 U.S. 672, 79 S.Ct. 1314, 3 L.Ed.2d 1503 (1959)
United States v. Krasovich, 819 F.2d 253 (9th Cir. 1987)
United States v. Velasquez, 772 F.2d 1348 (1985)

In order to establish the offense of conspiracy as charged in Count Twenty against Diane Griffin the government must prove these elements beyond a reasonable doubt:

1. that the alleged conspiracy existed, and
2. that an overt act was committed in furtherance of the conspiracy, and
3. that the defendant knowingly and intentionally became a member of the conspiracy, and
4. that the defendant knew that the objective of the conspiracy was to defraud the United States by impeding, impairing, obstructing and defeating the lawful functions of the Department of the Treasury, in particular, the Internal Revenue Service, in the ascertainment, computation, assessment and collection of the revenue generated by Alex Beverly.

If you find from your consideration of all the evidence in the case that all of these propositions have been proved beyond a reasonable doubt, then you should find the defendant you are considering guilty.

If, on the other hand, you find from your consideration of all the evidence that any of these propositions has not been proved beyond a reasonable doubt, then you should find the defendant you are considering not guilty.

A conspiracy is a combination of two or more persons to accomplish an unlawful purpose. A conspiracy may be established even if its purpose was not accomplished.

In determining whether the alleged conspiracy existed, you may consider the actions and statements of all the alleged participants. The agreement may be inferred from all the circumstances and the conduct of all the alleged participants.

With respect to the conspiracy charged in Count Twenty only, the government must prove that at least one overt act was committed by at least one conspirator to further the purpose of the conspiracy. It is not necessary that all the overt acts charged in the indictment be proved, and the overt act proved may itself be a lawful act.

In determining whether a defendant became a member of the conspiracy you may consider the acts and statements of that particular defendant. You may also consider the acts and statements of the other alleged conspirators which were made during the course of the alleged conspiracy, as bearing on the question of a defendant's membership in the alleged conspiracy.

To be a member of the conspiracy, a defendant need not join at the beginning or know all the other members or the means by which the purpose was to be accomplished. The government must prove beyond a reasonable doubt, from the defendant's own acts and statements, that he or she was aware of the common purpose and was a willing participant.

Defendant Griffin's Instruction No. 5A
Seventh Circuit Committee (1980) 5.11
Bourjaily v. United States, 107 S.Ct. 2775 (1987)
Ingram v. United States, 360 U.S. 672, 79 S.Ct. 1314, 3 L.Ed.2d 1503 (1959)
United States v. Krasovich, 819 F.2d 253 (9th Cir. 1987)
United States v. Velasquez, 772 F.2d 1348 (1985)

In order to establish the offense of conspiracy as charged in Count Twenty against Diane Griffin the government must prove these elements beyond a reasonable doubt:

1. that the alleged conspiracy existed, and
2. that an overt act was committed in furtherance of the conspiracy, and
3. that the defendant knowingly and intentionally became a member of the conspiracy, and

If you find from your consideration of all the evidence in the case that all of these propositions have been proved beyond a reasonable doubt, then you should find the defendant you are considering guilty.

If, on the other hand, you find from your consideration of all the evidence that any of these propositions has not been proved beyond a reasonable doubt, then you should find the defendant you are considering not guilty.

A conspiracy is a combination of two or more persons to accomplish an unlawful purpose. A conspiracy may be established even if its purpose was not accomplished.

In determining whether the alleged conspiracy existed, you may consider the actions and statements of all the alleged participants. The agreement may be inferred

from all the circumstances and the conduct of all the alleged participants.

With respect to the conspiracy charged in Count Twenty only, the government must prove that at least one overt act was committed by at least one conspirator to further the purpose of the conspiracy. It is not necessary that all the overt acts charged in the indictment be proved, and the overt act proved may itself be a lawful act.

In determining whether a defendant became a member of the conspiracy you may consider the acts and statements of that particular defendant. You may also consider the acts and statements of the other alleged conspirators which were made during the course of the alleged conspiracy, as bearing on the question of a defendant's membership in the alleged conspiracy.

To be a member of the conspiracy, a defendant need not join at the beginning or know all the other members or the means by which the purpose was to be accomplished. The government must prove beyond a reasonable doubt, from the Defendant Griffin's own acts and statements, that Defendant Griffin was aware that the common purpose of the conspiracy was to defraud the United States by impeding, impairing, obstructing and defeating the lawful functions of the Department of the Treasury, in particular, the Internal Revenue Service, in the ascertainment, computation, assessment and collection of the revenue generated by Alex Beverly and that she was a willing participant.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA

V.

DIANE GRIFFIN
1525 WEST 91st Street
Chicago, Illinois 60620

(Name and Address of Defendant)

JUDGMENT IN A CRIMINAL CASE

Case Number:
87 CR 521-7

MICHAEL LOGAN
Attorney for Defendant

THE DEFENDANT ENTERED A PLEA OF:

[___ guilty ___ nolo contendere] as to count(s) ___, and

x not guilty as to count(s) 20.

THERE WAS A:

[___ finding x verdict] of not guilty as to count(s) 20.

THERE WAS A:

[___ finding ___ verdict] of not guilty as to count(s) ____.

___ judgment of acquittal as to count(s) _____.

The defendant is acquitted and discharged as to this/these count(s).

THE DEFENDANT IS CONVICTED OF THE OFFENSE(S) OF: knowingly, willfully and unlawfully of conspiracy to hide assets and income; in violation of Title 18, United States Code, Section 371 as charged in count 20 of the indictment.

IT IS THE JUDGMENT OF THIS COURT THAT: The imposition of sentence on count 20 is hereby suspended and defendant placed on probation for a period of 5 years

on condition that she reside in and participate in the work release program of the Salvation Army for the first six months of said probation; that she obtain and maintain employment; and that she perform 500 hours of community service." "IT IS FURTHER ORDERED that execution of sentence is stayed until October 18, 1988."

"IT IS FURTHER ORDERED that defendant surrender on October 18, 1988."

In addition to any conditions of probation imposed above, IT IS ORDERED that the conditions of probation set out on the reverse of this judgment are imposed.

CONDITIONS OF PROBATION

Where probation has been ordered the defendant shall:

(1) refrain from violation of any law (federal, state, and local) and get in touch immediately with your probation officer if arrested or questioned by a law-enforcement officer;

(2) associate only with law-abiding persons and maintain reasonable hours;

(3) work regularly at a lawful occupation and support your legal dependents, if any, to the best of your ability. (When out of work notify your probation officer at once, and consult him prior to job changes);

(4) not leave the judicial district without permission of the probation officer;

(5) notify your probation officer immediately of any changes in your place of residence;

(6) follow the probation officer's instructions and report as directed.

The court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within the maximum probation period of 5 years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

IT IS FURTHER ORDERED that the defendant shall pay a total special assessment of $50.00 pursuant to Title 18, U.S.C. Section 3013 for count(s) 20 as follows:

IT IS FURTHER ORDERED THAT counts ___ are DISMISSED on the motion of the United States.

IT IS FURTHER ORDERED that the defendant shall pay to the United States attorney for this district any amount imposed as a fine, restitution or special assessment. The defendant shall pay to the clerk of the court any amount imposed as a cost of prosecution. Until all fines, restitution, special assessments and costs are fully paid, the defendant shall immediately notify the United States attorney for this district of any change in name and address.

IT IS FURTHER ORDERED that the clerk of the court deliver a certified copy of this judgment to the United States marshal of this district.

___ The Court orders commitment to the custody of the Attorney General and recommends:

SEPTEMBER 23, 1988
Date of Imposition of Sentence

/s/ Illegible
Signature of Judicial Officer

ANN C. WILLIAMS/U.S. DISTRICT JUDGE
Name and Title of Judicial Officer

SEPTEMBER 30, 1988
Date

RETURN

I have executed this Judgment as follows:

_____

_____

_____

Defendant delivered on _____ to _____ at
Date

_____, the institution designated by the Attorney General, with a certified copy of this Judgment in a Criminal Case.

_____
United States Marshal

By _____
Deputy Marshal

_____

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA,	)	
Plaintiff,	)	
v.	)	No. 87 CR 521
DIANE GRIFFIN,	)	
Defendant.	)	

MEMORANDUM OPINION AND ORDER

The defendant Diane Griffin moves for an order of release pending the appeal of her conviction pursuant to 18 U.S.C. § 3143(b) and Federal Rule of Appellate Procedure 9. This court previously denied the defendant's motion by minute order on October 12, 1988. On October 17, 1988, the Seventh Circuit Court of Appeals remanded this matter so that this court could state its reasons for denying the defendant's motion with more detail. The defendant's motion is denied for the following reasons.

Under 18 U.S.C. § 3143(b), a defendant must satisfy a two-prong test to be released on bond pending appeal. The first prong requires the defendant to show by clear and convincing evidence that he or she is not likely to flee or pose a danger to the safety of the community or any other person. 18 U.S.C. § 1343(b). The government does not contest the defendant's showing on this point. The second prong of the test requires the showing

> that the appeal is not for purpose of delay and raises a substantial question of law or fact likely to result in reversal, an order for a new trial, or a sentence that does not include a term of imprisonment

Id. In this circuit, "[a] substantial question 'is a close question or one that very well could be decided the other way.' " *United States v. Molt*, 758 F.2d 1198, 1200 (7th Cir. 1985), *cert. denied*, 475 U.S. 1081 (1986), *quoting United States v. Giancola*, 754 F.2d 898, 901 (11th Cir. 1985), *cert. denied*, 107 S.Ct. 669 (1986); *United States v. Greenberg*, 772 F.2d 340, 341 (7th Cir. 1985). Moreover, a "substantial question must be one that would result in reversal or a new trial on all counts for which the defendant has been sentenced." *United States v. Bilanzich*, 771 F.2d 292, 298 n. 6 (7th Cir. 1985).

The defendant Griffin was found guilty of the 18 U.S.C. § 371 conspiracy violation alleged in Count XX of the superceeding indictment. She has been sentenced to a five-year period of probation on the condition that she spend the first six months of this period in a work release program. The defendant was further ordered to obtain and maintain employment and to perform 500 hours of community service. Griffin makes two arguments which she contends raise a substantial question of law likely to result in the reversal of her conviction.

First, Griffin argues that there was insufficient evidence to support her conviction for conspiracy. In evaluating this claim, the court must determine "whether any rational trier of fact, taking the evidence and all legitimate inferences in the prosecution's favor, could have thought the facts sufficient to show guilt beyond a reasonable doubt." *United States v. Sblendorio*, 830 F.2d 1382, 1386 (7th Cir. 1987) , *cert. denied*, 108 S.Ct. 1034 (1988) (citing to, *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). Griffin was convicted of conspiracy to defraud the United States by impeding the Internal Revenue Service in the

ascertainment, computation, assessment, and collection of income taxes. The government must prove that Griffin was a member of the conspiracy and that she had knowledge of the purpose of the conspiracy. *See United States v. Guzzino*, 810 F.2d 687, 696 (7th Cir.) , *cert. denied*, 107 S.Ct. 1957 (1987); *United States v. Krasovich*, 819 F.2d 253, 255 (9th Cir. 1987).

To meet its burden of proof, the government may offer "circumstantial evidence and reasonable inferences drawn therefrom concerning the relationship of the parties, their overt acts, and the totality of their conduct. . . . " *United States v. Hooks*, 848 F.2d 785, 793 (7th Cir. 1988), *quoting United States v. Redwine*, 715 F.2d 315, 320 (7th Cir. 1983), *cert. denied*, 467 U.S. 1216 (1984); *see also Guzzino*, 840 F.2d at 697 (knowledge and specific intent may be proved by circumstantial evidence). In addition, "[c]ircumstantial evidence may include whether the defendant has a stake in the outcome of the conspiracy." *Hooks*, 848 at 792 (and cases cited within). Finally, "a single act is enough evidence [to show participation in the conspiracy] if the circumstances permit the inference that the act was 'intended to advance the ends of the conspiracy.' " *United States v. Silva*, 781 F.2d 106, 109 (7th Cir. 1986), *quoting United States v. Xheka*, 704 F.2d 974, 989 (7th Cir.), *cert. denied*, 464 U.S. 993 (1983).

In this case, Griffin concedes that there is evidence showing that she concealed various assets by placing property owned by her co-defendant Alex Beverly in her name. However, she contends that there is no evidence showing that she had knowledge of the purpose of the conspiracy. The evidence proven at trial is as follows. Griffin allowed Beverly to place the title to his property

located at 1454 South Pulaski and 1456 South Pulaski in her name. She filed false tax returns stating that her income was from Tit's Bar when she knew the income was Beverly's. Finally, Griffin used Beverly's money to purchase a 1986 Jaguar in her name. She paid for the car with the following sequence of payments: on September 16, 1985, she paid $500 cash; on September 23, 1985, she paid $7,000 cash; on September 30, 1985, she paid $8,000 cash; on October 1, 1985, she paid $7,000 cash; and on October 3, 1985, she paid $7,186 cash. The check was drawn on Griffin and Beverly's joint checking account. Her 1985 tax return indicated an income of only $5,459 from Tit's Bar.

Griffin cites several cases where courts have reversed convictions because there was no evidence to indicate that the defendants knew the object of the conspiracy or that they intended to impede the lawful functions of the IRS. *See, e.g., Ingram v. United States*, 360 U.S. 672, 678-79 (1959); *Krasovich*, 819 F.2d at 255-56. For example, in *Ingram* the petitioners were involved in a "large-scale and profitable gambling business". *Ingram*, 360 U.S. at 675. The court found that the petitioners engaged in the conspiracy to conceal the business, which was illegal under state law, from state law enforcement authorities. *Id.* at 677. Thus, the evidence in *Ingram* showed that the petitioners had a strong motivation to conceal the assets at issue independent of a motivation to defraud the IRS. In addition, there was no direct or circumstantial evidence showing that the petitioners had knowledge of the object of the tax conspiracy. *Id.* at 677-80. By contrast, the parties in this case agree that there was no evidence showing that Griffin was aware of the large scale drug conspiracy

which involved all of the other defendants with the exception of Joseph McCorkle who was acquitted. Thus, her actions could not have been motivated by an attempt to conceal this illegal activity from law enforcement authorities.

Moreover, in this case a rational jury could find that at least two of Griffin's efforts to conceal assets are "reasonably explainable only in terms of motivation to evade taxation." *Ingram*, 360 U.S. at 679. First, Griffin filed false tax returns claiming Beverly's income as her own. *Cf. Ingram*, 360 U.S. at 678 (there was no evidence that the petitioners had filed a return or paid a tax in previous years.) Second, Griffin paid for the Jaguar over a short period of time with a number of cash payments that were substantial but not large enough to trigger the IRS reporting requirements regarding cash payments in excess of $10,000. A jury could reasonably infer that Griffin's method of payment was intended to circumvent the IRS regulation. These two actions demonstrate a stronger link between Griffin and the tax laws than was shown in *Krasovich*. *Cf. Krasovich*, 819 F.2d at 256. Finally, Griffin has had a longstanding intimate personal relationship with Beverly. A rational jury could find that Griffin would obtain a benefit from any tax savings that Beverly received by virtue of the conspiracy's success. Consequently, there is sufficient evidence to support her conviction and she has failed to raise a substantial question of law on this point.

Griffin's second argument concerns the second objective of the conspiracy that was alleged in Count XX. The second objective of the conspiracy was to defeat the lawful function of the Department of Justice by impeding the

Drug Enforcement Administration's efforts to ascertain forfeitable assets. Both parties concede that there is *no* evidence showing that Griffin had knowledge of this objective of the conspiracy. Griffin argues that the court's failure to require the jury to answer a special interrogatory stating the jury's finding as to the object of the conspiracy warrants reversal. Without a special interrogatory, there is no way of knowing which objective of the conspiracy that the jury chose.

This argument, while superficially appealing, lacks merit. As stated by the Supreme Court, "[t]he general rule is that when a jury returns a guilty verdict on an indictment charging several acts in the conjunctive . . . the verdict stands if the evidence is sufficient with respect to any one of the acts charged." *Turner v. United States*, 396 U.S. 398, 420 (1970). As stated above, there was sufficient evidence to find that Griffin was a member of a conspiracy to defraud the United States by impeding the lawful functions of the IRS. The *only* evidence implicating Griffin related to this objective. The government did not even argue that Griffin had knowledge of the efforts to impair the DEA. *Cf. Stromberg v. California*, 283 U.S. 359, 365 (1937) (the government urged the jury that a conviction could be obtained solely on the basis of the statute's unconstitutional clause). Consequently, the jury *must* have believed the evidence regarding the IRS conspiracy to convict Griffin. *See Turner*, 396 U.S. at 420 ("the only evidence of a violation involving heroin was Turner's possession of the drug, the jury to convict must have believed this evidence").

The cases cited by Griffin are distinguishable. The holdings of these cases compel "an appellate court to

reverse where a general jury verdict renders it impossible to say whether a defendant was convicted under an erroneous or a valid view of the law." *United States v. Head*, 641 F.2d 174, 178 (4th Cir. 1981), *cert. denied*, 462 U.S. 1132 (1983) (citing to *Stromberg v. California*, 283 U.S. 359 (1931) and *Yates v. United States*, 354 U.S. 298 (1957)). Griffin does not contend that the court's instruction contained an erroneous statement of the law. Consequently, her cases are inapposite. Accordingly, this argument also fails to raise a substantial question of law likely to result in reversal.

Conclusion

For the foregoing reasons, the court denies the defendant's motion for bond pending appeal.

ENTER:

/s/ Ann Claire Williams
Ann Claire Williams, Judge
United States District Court

Dated: OCT 28 1988

In the
United States Court of Appeals
For the Seventh Circuit

Nos. 88-2985, 88-2986, 88-2987 and 88-2988

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

ALEX BEVERLY, BETTY MCNULTY,
GEORGE BROWN and DIANE GRIFFIN,

Defendants-Appellants.

ARGUED OCTOBER 27, 1989 – DECIDED SEPTEMBER 7, 1990

Before EASTERBROOK and RIPPLE, *Circuit Judges*, and ESCHBACH, *Senior Circuit Judge*.

RIPPLE, *Circuit Judge*. A jury found the defendants – Alex Beverly, Betty McNulty, George Brown, and Diane Griffin – guilty of various drug trafficking and/or conspiracy offenses. The defendants appeal their convictions on a multitude of grounds. For the following reasons, we affirm.

I

BACKGROUND

On February 10, 1988, a federal grand jury returned a twenty-three count superseding indictment against the defendants.[1] The indictment alleged two conspiracies:

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[1] The original indictment was returned against Alex Beverly, George Brown, Betty McNulty, Willie Jordan, Joseph

(Continued on following page)

count one charged Alex Beverly, George Brown, and Betty McNulty with conspiring to distribute and possess with the intent to distribute heroin and cocaine in violation of 21 U.S.C. § 841(a)(1). Count twenty alleged that Alex Beverly, Betty McNulty, and Diane Griffin conspired to defraud the United States by impairing the efforts of the Internal Revenue Service (IRS) and of the Drug Enforcement Agency (DEA) in ascertaining income taxes and forfeitable assets, respectively, in violation of 18 U.S.C. § 371. In addition to the conspiracies, the indictment charged Alex Beverly, Betty McNulty, and George Brown with multiple narcotics-related offenses. Mr. Beverly also was charged with engaging in a continuing criminal enterprise in violation of 21 U.S.C. § 848. Diane Griffin was charged with only the fraud conspiracy.

A. *Facts*

1. Narcotics transactions

a. Alex Beverly, George Brown

From at least 1980 to 1986, Alex Beverly controlled a large-scale narcotics operation involving George Brown, Betty McNulty, and others. Mr. Beverly purchased drugs through Peter Suarez, a cocaine supplier and government

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McCorkle, and Charles Avant. The superseding indictment was returned against Alex Beverly, George Brown, Betty McNulty, Diane Griffin, McCorkle, and Avant. Jordan died before the case was tried, McCorkle was found not guilty on all counts, and Avant pled guilty.

witness.[2] The two men first met in late 1979. Mr. Beverly was attempting to open an after-hours club in a house on Sangamon Street in Chicago and told Suarez that he needed some cocaine to start the business. Approximately one month later, Suarez met Mr. Beverly at the house on Sangamon. The house was equipped with gambling tables and a bar from which drinks and cocaine were being sold. Suarez met Willie Jordan, who was introduced as Mr. Beverly's "righthand man," and George Brown, who was introduced as Mr. Beverly's "close associate, brother like." Tr. at 729, 730, On this occasion, Suarez sold Mr. Beverly roughly two ounces of cocaine. Over the next few months, Suarez returned to the Sangamon address several times to deliver another two to three ounces of cocaine. Both Mr. Beverly and Mr. Brown were present for each transaction, as was Jordan.

In March 1980, the police raided the Sangamon house and arrested everyone present for gambling, including Suarez, who was there to deliver cocaine. He stopped making deliveries after the raid, but resumed when Mr. Beverly contacted him the next month. In late April of 1980, Suarez went to an apartment on Chicago Avenue and delivered four ounces of cocaine; Mr. Beverly diluted the drug and converted it into rock cocaine. He then gave

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[2] Suarez testified at trial pursuant to a plea agreement stemming from drug charges in a separate case. Because he had been convicted previously on similar charges, he was a second offender facing up to forty years in prison. Under the plea agreement, he cooperated with the government in exchange for being treated as a first time offender. Suarez was granted immunity for his testimony in this case and ultimately was sentenced to eight years in prison in the separate case.

the cocaine to George Brown and instructed him to take it to a Mayfield Avenue address. Mr. Beverly told Suarez that he had opened a house on Mayfield and was "going to start doing a lot of business out of that house and that he was going to increase the buys of cocaine and the sales." Tr. at 741-42.

Suarez delivered cocaine to Mr. Beverly at the Chicago Avenue apartment several more times, then began making regular deliveries to Mr. Beverly at the house on Mayfield.[3] From 1980 until 1982, Suarez delivered as much as half a kilogram of cocaine to Mr. Beverly as often as once a week. While he was there making deliveries or waiting to be paid, Suarez observed Mr. Brown selling small packages of white powder for $50 and $100. He also observed Mr. Brown convert cocaine from powder to rock form for customers, who then would smoke the drug.

Toward the end of 1981, Suarez became interested in establishing drug connections in Colombia. He continued to supply Mr. Beverly with cocaine, but introduced Mr. Beverly to a friend from Florida who would service Mr. Beverly's drug needs in the interim. Suarez participated in two of these referral drug transactions, one in Florida and one at the Mayfield house in Chicago, in which Mr. Beverly purchased cocaine from Suarez' friend. In July of 1982, Suarez was arrested in Puerto Rico as he tried to bring Colombian cocaine into the United States. He was convicted and imprisoned until December 4, 1985. Shortly after his release, he contacted Mr. Beverly. They met in

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[3] Like the Sangamon house, the Mayfield property was outfitted as a gambling establishment.

Chicago in late March of 1986 at a bar called Mercedes.[4] Further cocaine transactions were discussed but no deals were arranged because Mr. Beverly did not have cash available and Suarez could not sell on credit.

In April 1986, Mr. Beverly contacted Suarez and asked to purchase two kilograms of cocaine. Suarez, who was living in Florida, arrived in Chicago on the weekend of April 11, 1986. On April 13, Mr. Beverly, who did not have enough money for both kilograms, purchased half a kilogram of cocaine for $12,000. The men met at Tit's Bar, a business Mr. Beverly had purchased for his girlfriend, Diane Griffin, then went next door to Blacon's Liquor Store, a business owned by Mr. Beverly. George Brown arrived at Blacon's with $10,000 in cash; Mr. Beverly took $2,000 out of the cash register at Tit's to make up the difference. Upon Mr. Beverly's direction to take the drugs back to the Mayfield house, Mr. Brown left the liquor store with the cocaine. Mr. Beverly then told Suarez that he would be in touch in the future whenever he needed more cocaine. They agreed that the next deal would take place somewhere between Florida and Chicago so that Suarez, who was on parole, would not have to be away from the Miami area for any great length of time.

Toward the end of April 1986, Mr. Beverly again contacted Suarez and indicated that he needed two

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[4] Wesley's Drive-In, George Brown's business, is located on the property adjoining the Mercedes bar. The bar originally was named Somons, but was renamed Mercedes sometime in 1986. Because another establishment called Somons Lounge is involved in this case, the original Somons will be referred to as Mercedes.

kilograms of cocaine. The pair agreed to meet in Mobile, Alabama, where, on the first weekend of May 1986, Mr. Beverly paid Suarez $52,000 in cash for two kilograms of cocaine. Suarez travelled to Chicago two weeks later at Mr. Beverly's request to deliver another two kilograms of cocaine. They met at Somons Lounge, another one of Mr. Beverly's properties, on May 17. Mr. Beverly telephoned George Brown, who appeared at Somons with $27,000 in cash, enough for one kilogram of cocaine. Suarez took the cash and gave the cocaine to Mr. Beverly, who instructed Mr. Brown to take the drugs back to the Mayfield house.

This routine was repeated throughout the summer and fall of 1986. On June 21, Suarez and Mr. Beverly met at Tit's. Suarez said hello to Diane Griffin, who was working behind the bar, then accompanied Mr. Beverly to the back of Blacon's Liquor Store. Following a telephone call from Mr. Beverly, Mr. Brown arrived with $27,000 in cash. Mr. Beverly purchased one kilogram of cocaine, which he gave to Mr. Brown with directions to return to the house. On July 20, Mr. Beverly and Suarez waited at Blacon's until Mr. Brown arrived with, on this occasion, $10,000. Although Suarez charged $27,000 per kilogram, he gave Mr. Beverly a full kilogram of cocaine and said he would get the rest of his money later. On July 30, Suarez went to Somons Lounge to collect the debt. Mr. Beverly stated that he did not have the money but planned to gamble that night; the next morning, Mr. Beverly gave Suarez $10,000 in cash. On both August 9 and 24, Mr. Beverly purchased one kilogram of cocaine with money delivered at Mr. Beverly's request by George Brown. The first transaction took place at Somons with a purchase price of approximately $28,000; the second took place at

Blacon's with a price of $27,000. On both occasions, Mr. Beverly gave the drugs to Mr. Brown with instructions to return to the house.

Mr. Beverly made two drug purchases in October. On October 18, Suarez and Mr. Beverly met at Somons Lounge, then drove to a woman's house and picked up a bag of cash. They then returned to Somons, where Mr. Brown was waiting with another bag of money. Together, the bags contained approximately $32,000 in cash, for which Mr. Beverly received a kilogram of cocaine. On his next trip to Chicago, Suarez met Mr. Beverly at Blacon's Liquor Store.

The last meeting between Mr. Beverly and Suarez took place in Florida on November 7, 1986. Suarez had completed a sale of one kilogram of cocaine to Mr. Beverly's associate, Joseph McCorkle, before Mr. Beverly and several friends arrived in Miami for a football game. Suarez had a brief discussion with Mr. Beverly to explain that McCorkle had left Florida with the cocaine. The following weekend, on November 17, 1986, Suarez was arrested in Las Vegas, Nevada for possession with intent to distribute three kilograms of cocaine.

Evidence regarding these defendants' narcotics transactions also was provided by Johnny Davis, a paid informant for the DEA.[5] At the time he began working for

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[5] Davis began working for the DEA in mid-March of 1986, after moving out of his home due to arguments with his wife. The quarrels concerned Mrs. Davis' relationship with Betty McNulty, who used drugs in the Davis home and persuaded Mrs. Davis to pick up more drugs for her. At the time of trial,

(Continued on following page)

the DEA, Davis had known Mr. Beverly for more than twelve years. On March 24, 1986, Davis went to the Mercedes bar to arrange the purchase of one ounce of brown heroin. Davis met with Willie Jordan and, in order to get a DEA agent involved, stated that he had a friend interested in buying some heroin. Two days later, Davis returned to Mercedes with undercover DEA agent Herbert Milton. They spoke with Mr. Beverly, who made two calls from a private phone behind the bar, during one of which Davis heard Mr. Beverly ask whether "Johnny is still all right." Tr. at 242. Mr. Beverly spoke privately to Willie Jordan for a few minutes, after which Jordan handed a package to Davis. Davis observed that the package was a clear plastic bag containing what looked like brown heroin. He passed the bag to Agent Milton and gave Jordan $950. Laboratory tests later revealed that the bag contained 24.93 grams of 2.6% heroin.

On April 1, 1986, Davis went to Mercedes and negotiated a purchase of three ounces of heroin. Davis and Agent Milton returned to the bar the next day and paid Jordan $2,700 for a bag containing 75.50 grams of 2.5% heroin. A month later, on May 2, Davis and Agent Milton went back to Mercedes. They informed Mr. Beverly that they were there to buy three ounces of heroin. Agent Milton ultimately purchased 75.95 grams of 3.4% heroin from Jordan for $2,700. Davis returned to Mercedes on

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(Continued from previous page)

Davis had been paid some $37,000 by the DEA for information supplied in this and other narcotics investigations. He was to receive an additional $10,000 following the trial, conditioned on his giving truthful testimony.

June 24 and asked Mr. Beverly to contact Willie Jordan. Mr. Beverly made several phone calls from the private line behind the bar. When Jordan arrived, he had a private conversation with Mr. Beverly and then told Davis that the package he had ordered was ready. The next day, on June 25, Davis and Agent Milton went to the bar together and purchased a bag of heroin from Jordan for $1,800. Laboratory tests showed that the bag contained 51.28 grams of 2.7% heroin. This was the last purchase from Jordan and Mr. Beverly, although both Davis and Agent Milton attempted to arrange more transactions.

b. Betty McNulty

At the time Johnny Davis began working for the DEA, he had known Ms. McNulty for more than fifteen years. On August 6, 1986, Davis met with Ms. McNulty at the offices of Blacom Corporation, a company controlled by Alex Beverly, and told her that he had a friend interested in buying half an ounce of cocaine at a good price. Ms. McNulty responded that the price would be $900. On August 11, Davis placed several telephone calls to Ms. McNulty that were recorded from the DEA offices. During the first call, Ms. McNulty indicated that she was having trouble getting the cocaine from Willie Jordan but would continue to try. In the second call, Ms. McNulty initially expressed anger with Davis because she believed that he had spoken poorly of her to his wife the night before, and suggested that she might not set up the transaction. After Davis explained that she had misunderstood, Ms. McNulty apparently calmed down and returned to the topic of the cocaine sale. She informed him that Jordan was not home and told him to call back

later. She also asked Davis whether he wanted the cocaine "[a]ny special way." Govt. Ex. T-3b at 5. He said that he wanted it in rock form, but Ms. McNulty advised him that "when you get it like that ya get less." *Id.* She explained that she previously had obtained cocaine for a friend in powder form at a better price and a larger quantity than in rock form. *Id.*[6] On the morning of August 12, Davis placed another recorded telephone call to Ms. McNulty. He then was fitted with a body recorder and proceeded to Ms. McNulty's home. Davis counted out $900 and gave it to Ms. McNulty, who recounted the money and then handed him a clear plastic bag filled with white powder. Ms. McNulty commented that she had obtained the cocaine from Willie Jordan. Laboratory tests revealed that the bag contained 13.05 grams of 90% pure cocaine.

Two weeks later, on August 27, Davis purchased a second bag of cocaine from Ms. McNulty. On this occasion, Davis met Ms. McNulty at the Blacom offices. He counted out the money he had brought and, after Ms. McNulty had recounted it, he received a clear plastic bag containing 27.70 grams of 89% pure cocaine. Ms. McNulty wrapped up the plastic bag in several magazines, placed the package in a shopping bag, and warned Davis to get off the street quickly. She also demonstrated how he

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[6] Ms. McNulty actually stated that "they gave [the friend for whom she obtained the cocaine] a nice play. . . . [T]hey didn't specify in the rock form and it was ya know, over what they had." Govt. Ex. T-3b at 5. In drug parlance "nice play" means that the price is decreased somewhat and "over" means that the buyer receives slightly more than he paid for. Tr. at 326-27.

should carry the bag so that no one would think it contained drugs or anything else of value.

2. Other drug-related evidence

During the investigation of this case, DEA agents searched an apartment located at 5436 West Division Street in Chicago. The telephone at that address was listed in George Brown's name. Pursuant to a search warrant, agents seized documents and other items. Several of the documents bore Mr. Brown's name and the 5436 West Division address, including a gas bill, a real estate tax bill, and a business card for Wesley's Drive-In. The agents also recovered weapons, money, narcotics, and drug paraphernalia, including: two automatic guns and thirty-one rounds of ammunition; three knives; $1,400 in cash; quantities of white and brown cocaine; a triple beam scale; a steel pot containing a razor blade, glassine envelopes, and cutting powder; a blender, sifter, and spoon, each of which contained heroin with traces of cocaine and quinine.

A DEA expert testified that the equipment used for cutting drugs includes blenders and sifters, which are used to break up firmly packed cocaine and mix it with other substances, and razor blades, which are used to divide up quantities of drugs for distribution. In addition, the expert testified that the type of scale recovered from 5436 West Division would be used by a drug dealer rather than a user, and that drug dealers tend to be armed with the type of guns and knives recovered by the government to protect both themselves and their narcotics.

3. Financial considerations

a. Blacom Corporation

i.

Blacom, a construction company, was incorporated by Perry Beverly on January 25, 1985. Perry, who is Alex Beverly's brother, became Blacom's sole shareholder, director, president, secretary, and treasurer upon incorporation. He was twenty-six years old at the time and, although he had some experience in construction, he had no prior business experience. Corporate records reveal that 1,000 shares of stock were issued to him at a total value of $1,000. However, Perry never invested any money in Blacom. During Perry's tenure with the company, Blacom purchased property and opened food and liquor stores. Although Perry was in charge of the whole enterprise, he had no idea how much revenue Blacom received for its various construction jobs or in what form payment was made, nor did he know where the money came from to open the stores or purchase property. He resigned from Blacom in August of 1985 and transferred the company, together with his shares, to Betty McNulty. Ms. McNulty received an additional 29,000 shares when she took over although, like Perry Beverly, she never made any capital contributions.

A Blacom corporate meeting was held in January of 1986. The meeting was attended by Eclorise Scott, William White, Yvonne Elliott, Joe Gibbs, Betty McNulty, Alex Beverly, and Larry Saska, an attorney who represented both Blacom and Mr. Beverly. In that meeting, Mr. Beverly announced that Scott, White, Elliott, and Gibbs would become ten percent shareholders of the company

and Ms. McNulty would become a sixty percent shareholder. None of these parties purchased their shares or made other investments. Mr. Beverly also suggested who would become officers of Blacom. Although Mr. Beverly was not a record shareholder or a Blacom officer, all of his suggestions were adopted without discussion.

A bookkeeper from Statewide Accounting prepared Blacom's corporate and sales tax returns for 1985 and 1986. She testified that she realized in early 1986 that Blacom's expenditures far exceeded its income. By examining receipts from Blacom's liquor purchases, it became clear that, because the company had made payments to distributors in cash, there was extra cash on hand that did not go through the bank and was not reflected in corporate accounts. William White, one of the participants in Blacom's January 1986 meeting, suggested that Statewide mark up the bank deposits to account for any discrepancy. Statewide, which also worked for George Brown, was informed that Mr. Brown owned Wesley's Drive-In and that all work concerning his account was to be picked up at the Blacom offices. However, the fire insurance for Wesley's Drive-In was in Alex Beverly's name.

ii.

Blacom had extensive holdings by the time Ms. McNulty took over in 1985. In 1984, Mr. Beverly had purchased the real estate located at 5436-38 West Division Street in Chicago. Larry Saska paid the $40,000 balance due at the closing with checks and cash given to him by George Brown. Mr. Beverly instructed Saska to transfer

the property to a land trust, the beneficiary of which was Diane Griffin, but later directed Saska to place the property into a trust having Blacom as its beneficiary. Because less than $100 consideration was paid for each of these transfers, they were tax exempt. In September of 1984, Mr. Beverly paid $8,000 in cash for the property at 1811 South Harding, the house in which Betty McNulty later lived. Ms. McNulty was the named grantee in the 1984 deed, although Mr. Beverly directed Saska to transfer the property into Diane Griffin's trust and then into Blacom's trust. Mr. Beverly also had the properties located at 1812 South Millard and 1801-07 South Lawndale placed originally in Diane Griffin's trust and later transferred to Blacom's trust.

In March of 1985, Mr. Beverly became the beneficiary of a trust that held property on West Ogden Avenue, the location of Blacom's offices. In July of that year, he transferred this interest to Blacom for no consideration. His beneficial interest in a building which housed one of the Blacom food and liquor stores similarly was transferred to Blacom in July of 1985 for no consideration. Finally, the property housing Somons Lounge was acquired by Blacom in 1985. Mr. Beverly never held a property interest in this particular land, although he was present during the contract negotiations for its purchase. Mr. Beverly also was involved in several rental properties. In 1984, he negotiated an $800 monthly rental for what became the Mercedes bar. The lease identified Ms. McNulty as lessee and Mr. Beverly as guarantor. Mr. Beverly also negotiated an agreement with the owner of a liquor and grocery store whereby Mr. Beverly would purchase the store's assets for $25,000 and rent the building for $3,500 per

month. The original lease named Blacom as the lessee, but the lease later was changed at Mr. Beverly's direction to name Betty McNulty as the lessee.

In addition to his other connections with these properties, Mr. Beverly arranged for essentially complete renovations of three separate properties, including Somons Lounge. The gutted building that eventually housed Somons had to be reduced to bare brick and started over. Mr. Beverly paid the workers on these projects in cash and also paid for the construction materials.

b. Betty McNulty

Ms. McNulty and Mr. Beverly lived together from the late 1970s through at least 1985. As described above, Mr. Beverly placed in Ms. McNulty's name the leases for two rental properties and the deed for the house they shared. Ms. McNulty, accompanied by Mr. Beverly, purchased the property at 1812 South Millard for $5,000 to 6,000 cash. She became the titleholder of a late-model Mercedes Benz purchased and driven by Mr. Beverly. She also received public assistance from at least May 1982 to February 1984. Bank records from 1984-86 reveal that the minimum amount of checks drawn on her personal checking account were: $27,441.92 in 1984; $65,981.67 in 1985; $57,071.94 during the first eleven months of 1986. During this same three-year period, Ms. McNulty wrote $33,484.09 in checks payable to Mr. Beverly's American Express account. All payments on Mr. Beverly's American Express card were made from Ms. McNulty's bank account.

Betty McNulty's 1985 federal tax returns[7] revealed that she held Somons and one of the Blacom food and liquor stores as sole proprietorships. In 1986, she reported $22,000 in income from Blacom, although Blacom's corporate tax return for the fiscal year ending May 1986 showed that no company officers had received any compensation.

c. Diane Griffin

For at least part of 1986, Ms. Griffin and Mr. Beverly shared an apartment located above Tit's lounge. The building originally was owned by Burl Price, who sold it to Haley Rainey. In 1980 or 1981, Rainey told Price that he wanted to pay off the debt because he was selling the building to someone else. When Price received a notice of delinquent taxes on the property several months later, he called Alex Beverly, who picked up the notice and said he would take care of it. On August 30, 1983, Ms. Griffin obtained the beneficial interest in a land trust containing both this property and the adjoining building, which houses one of the Blacom food and liquor stores. Ms. Griffin received public assistance from at least 1978 until October of 1984, when her benefits were cancelled because the Illinois Department of Public Aid (IDPA) could not locate her. In September of 1983, several weeks after receiving the interest in the land trust discussed above, Ms. Griffin signed an IDPA document indicating that she had no income or resources.

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[7] Ms. McNulty did not file returns for the years 1981-84.

Ms. Griffin did not file tax returns in 1981-82 or 1986, although Mr. Beverly told Suarez in March of 1986 that he had purchased Tit's for her. The government also introduced other evidence concerning Ms. Griffin's assets. For example, in September 1985, Mr. Beverly purchased a $35,000 Jaguar for Ms. Griffin. The Jaguar, which carried the license plate "Alex, Jr.," was purchased in Ms. Griffin's name but paid for by Mr. Beverly, primarily in cash.[8] Bank records reveal that most of the checks drawn on an account they held jointly were for business expenses such as liquor purchases and electric bills. The minimum amount of checks drawn on the account were: $1,975.43 in 1983; $81,354.80 in 1984; $47,460.65 in 1985; $7,847.08 in 1986.

d. Alex Beverly

According to Perry Beverly, the only "regular" job Alex Beverly held from 1980-86 was as a delivery man for some period in 1982 or 1983.[9] Robert Beverly testified that his brother Alex did some construction work in 1985 or 1986. Ronald Smith, who identified Mr. Beverly as

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[8] An initial down payment of $500 in cash was made on September 16, 1985. A $7,000 payment was made on September 23, 1985 by check, followed by cash payments of $8,000 and $7,000 on September 30 and October 1, respectively. On October 2, 1985, another cash payment of $6,000 was made, and the final payment of $7,186 was made in cash on the next day, October 3.

[9] When Perry Beverly testified before the grand jury, he stated that he had never known his brother to have legitimate employment; he did not mention that his brother had worked as a delivery man.

"one of [his] best friends," knew only that Mr. Beverly did some construction work in the early 1980s. Tr. at 1725. However, in addition to the extensive expenditures and financial transactions noted above, Alex Beverly spent money on clothes and other items. For example, in November 1985, he purchased a fur coat for a cash price of $1,395. He bought a second fur jacket in December, monogrammed "Mr. Beverly" in the lining, for a cash price of $3,995. Suarez warned Mr. Beverly to be careful with the way he handled his money, but Mr. Beverly responded that he was "licensed under his women and some of his apartments to do that kind of thing and keep it isolated from the business." Tr. at 853. Although Mr. Beverly did not file tax returns from 1982-86, the IRS was able to estimate, based on the evidence regarding his drug transactions, that his adjusted gross income in 1986 was $224,500.

4. Suarez letter

In approximately September of 1987, after the original indictment had been returned against the defendants, Peter Suarez wrote a letter (the Suarez letter) to the Assistant United States Attorney (AUSA) who tried this case. On June 2, 1988, the AUSA notified defense counsel of the letter's existence, but informed counsel that she could not locate it. She recalled that she had given the letter to one of the DEA agents involved in the investigation, but in preparing for trial they were unable to locate either the original letter or a copy. She believed that the letter was approximately three handwritten pages. The AUSA summarized her recollection of the letter as follows:

> The salutation on the letter was "Dear Andrea". Suarez went on to say that he believed he could address me by my first name because he felt that we were "working for the same team". Suarez reiterated his desire to cooperate with the government and added "I want to do everything I can to help you convict Beverly". Suarez then expressed some concerns about his safety at the institution where he was housed. I do not remember the specifics of those concerns. Suarez closed the letter with a request that he be moved to a different facility.

Appellants' Consolidated Br. at App. 5. At trial, Suarez was unable to add any further detail to the AUSA's recollections.

On June 9, 1988, the day the trial began, Alex Beverly and George Brown moved to bar Suarez' testimony based on the government's failure to disclose the letter. They also served a trial subpoena upon the AUSA to appear as a witness on behalf of Mr. Beverly. The government moved to quash. The court denied the motion to bar and granted the government's motion to quash. The defendants subsequently moved to strike Suarez' testimony or, in the alternative, for a hearing "to ascertain the nature of the Government's misconduct in losing this important evidence, and to determine appropriate sanctions." R.253 at 1. Following oral argument by the defendants and the government, the district court denied the alternative motions.

B. *The Trial*

At the trial, which extended over a five week period, the government established the facts set forth above. The

government also introduced various charts summarizing information obtained from pen registers attached in 1986.[10] The director of technical operations for the Chicago office of the DEA testified that he had supervised the installation of at least 50 pen registers and had personally installed over 500 such devices. Having been transferred to the Chicago office in 1986, he could not testify from personal knowledge that the pen registers used in this case were connected properly. However, he testified that pen register installation procedures are uniform throughout the United States and that, in his experience, the DEA had never attached a pen register to the wrong telephone number. The records generated in this case revealed that, in the course of a three week period in December 1986, forty-nine calls were placed from the Mercedes bar to Wesley's Drive-In and seven calls were made from the bar to George Brown's address.

After the trial began the defendants learned that telephone calls recorded in a separate Federal Bureau of Investigation (FBI) case might involve Mr. Beverly. Mr. Beverly's attorney requested that he be given a continuance to listen to the tapes. The district court determined that the tapes were not discoverable and denied the request. At trial, Mr. Beverly presented evidence that he had made money gambling. Hurley Teague testified that be built a dice table for Mr. Beverly in early 1986. That table and another dice table were used at Somons

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[10] A pen register is an electronic device that registers all telephone numbers dialed from the telephone line to which the device is connected. Tr. at 2442.

Lounge.[11] Teague stated that he helped wire the second table and install a magnetic coil in its false bottom. He also testified that he placed a large magnet in a stool used with the table he had built and observed that when the stool was placed close to the table, the dice would come up as seven's or eleven's. Teague stated that he observed Mr. Beverly and others playing dice, once at the table he had constructed and once at the second table. On at least one of those occasions, there was "a lot of money" on the table. Tr. at 2824.

Tim Robinson also testified about Mr. Beverly's gambling background. Robinson stated that he and Mr. Beverly operated a gambling house on Sangamon Street from late 1979 until 1984. As the housemen, they took ten percent of all bets. Most of the gambling took place at the dice tables, although card games also were placed. After the police closed down the house, Robinson "wrote" horses and the lottery for Mr. Beverly until 1986.[12] Mr. Beverly received seventy-five cents of every dollar bet and paid the winners; Robinson received the remaining twenty-five cents but did not have any pay-off responsibilities. Robinson testified that his monthly income from the Sangamon business was $15,000-20,000 and that his

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[11] The second dice table replaced the table built by Hurley Teague. Teague testified that he moved the original table from Somons to the Blacom warehouse on West Ogden when the second table arrived. However, no dice tables like those described by Teague were discovered when Somons and the Blacom properties were searched in July of 1987 as part of the investigation in this case.

[12] Robinson wrote up bets as they were placed and collected the bet money.

net income for those 4 to 5 years was well over $100,000 per year. He stated that, from 1984-86, when he wrote bets, he made at least $300,000 per year. Gary Hubbard also testified that he had gambled with Mr. Beverly since 1969. He recalled that Mr. Beverly won approximately $25,000 one night in 1985 and approximately $30,000-35,000 one day in May 1987.

Finally, Mr. Beverly called Dr. Chester Layne, Mr. Beverly's dentist and a former cocaine addict. The government objected to the testimony defense counsel sought to elicit from Dr. Layne. According to the defendant's offer of proof, Dr. Layne would have testified that Mr. Beverly counseled him on his cocaine addition and that he sought professional help as a result. Dr. Layne also would have testified that he never saw Mr. Beverly buy or sell cocaine, and that although drugs were sold outside of Somons, Mr. Beverly was not the seller. The district court excluded this testimony on hearsay and relevance grounds.

Betty McNulty presented two witnesses to support her entrapment defense. Ms. McNulty's mother testified that in August 1986, Johnny Davis, the DEA informant, called Ms. McNulty's home as often as four or five times each day. Yvonne Elliott, Blacom's bookkeeper, also testified that, in August 1986, Davis frequently telephoned Ms. McNulty at the company's offices and came by in person to see her several times.

Dianne Griffin called three women who testified that they were employed by Tit's lounge and knew Mr. Beverly. They all stated that Mr. Beverly never told them how to do their jobs and that he paid for his drinks like the

other customers. The defendants[13] also presented testimony from James Ragan, the DEA agent who interviewed Peter Suarez in Las Vegas on January 7, 1987. Agent Ragan acknowledged that his report from the first interview with Suarez did not mention several points on which Suarez testified at trial.

C. *Jury Instructions*

The district court instructed the jury on July 13, 1988. With regard to the continuing criminal enterprise charge against Alex Beverly, the court instructed the jury not to consider Diane Griffin, Johnny Davis, or Agent Milton in determining whether Mr. Beverly acted in concert with five or more people. The court denied Mr. Beverly's request to include Peter Suarez in the list of persons the jury could not consider. The court also denied Mr. Beverly's request that the jury be required to return special verdicts identifying the five people found to have participated in the continuing criminal enterprise.

During the trial, Ms. Griffin moved from severance, which the district court denied. She claimed that the government's only theory was her alleged participation in a conspiracy to evade taxes because there was no proof that she knew Mr. Beverly was a drug dealer. The government maintained that such proof was not necessary and that the jury could return a guilty verdict under either the drug or tax arm of the fraud conspiracy. Ms. Griffin

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[13] George Brown did not call any witnesses specifically on his behalf.

subsequently objected to the government's proposed conspiracy instruction on the ground that it did not differentiate between the drug and tax objectives. She submitted an alternate instruction that would have required the jury to (1) find that she knew that the object of the conspiracy was to impede the IRS in ascertaining Mr. Beverly's taxes, and (2) identify, via special interrogatories, the objective of which the jury believed she had knowledge. The district court denied both her jury instruction and requested special interrogatories. After deliberating, the jury returned guilty verdicts on all but three counts.[14]

D. *Sentencing*

Following a September 23, 1988 sentencing hearing, the district court set forth its factual conclusions and imposed sentence. Based on their respective convictions, Alex Beverly received a 35 year sentence, lifetime special parole, and a $100,000 fine; George Brown was sentenced to 20 years imprisonment and lifetime special parole; Betty McNulty received a 3 year sentence followed by 10 years of special parole; Diane Griffin received a suspended sentence and was placed on probation for 5 years on the condition that she reside and participate in the Salvation Army's work release program for the first 6 months of probation, obtain and maintain employment, and perform 500 hours of community service.

With specific regard to George Brown, the only defendant who challenges his sentence, the court determined that:

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[14] Mr. Beverly and Mr. Brown each were acquitted of three counts of possession of cocaine with the intent to distribute.

> [b]ased on the evidence in this case, it's clear to the Court you were second in command. You've been involved in this enterprise since at least 1979 and through 1987. You ran at least one of the smoke houses. You were the one that brought the cash and retrieved large quantities of narcotics on a regular and frequent basis. There were numerous firearms found in your apartment.

Sentencing Tr. at 49.[15]

II
ANALYSIS

All the defendants challenge several decisions made by the district court. Each defendant also raises additional issues on appeal. We shall analyze the combined claims first, then address each defendant's separate contentions.

A. *Consolidated Arguments*

1. Peter Suarez' testimony

Alex Beverly and George Brown challenge the district court's denial of their motion to strike Suarez' testimony.[16] As we have noted previously, *see supra* p. 15, a

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[15] The government had argued at the sentencing hearing that "Mr. Brown wasn't involved in a small level. He wasn't a mope who just delivered. He was up there at the top. And because of that, Judge, and because of the fact that he has a prior record and because of the fact that there really is – are no really mitigating factors for Mr. Brown." Sentencing Tr. at 20.

[16] The district court earlier had denied the defendants' motion to bar Suarez' testimony. We affirm that denial for the same reasons we uphold denial of the motion to strike.

week before trial, the Assistant United States Attorney disclosed to defense counsel that she had received a letter from Suarez that offered to "do everything I can" to assist in the conviction of Mr. Beverly. The letter had been lost and a search had failed to uncover it. Mr. Beverly and Mr. Brown contend that the government failed promptly to disclose the Suarez letter and that the government's subsequent loss or destruction of that letter deprived them of due process.

During the discovery process, the government must disclose evidence favorable to the defendant that, if suppressed, would deprive the accused of a fair trial. *Brady v. Maryland*, 373 U.S. 83, 86-87 (1963); *see United States v. Bagley*, 473 U.S. 667, 674-75 (1985). This duty extends both to exculpatory evidence and to evidence that might be used to impeach the government's witnesses. *Bagley*, 473 U.S. at 676; *Giglio v. United States*, 405 U.S. 150, 153-54 (1972). The duty stems from the fact that nondisclosure of such evidence violates due process. *Bagley*, 473 U.S. at 675; *Brady*, 373 U.S. at 86. The government does not dispute its obligation to disclose the existence of the Suarez letter to the defendants.

We do not believe that the defendants were denied due process of law by the timing of the disclosure. In *United States v. Allain*, 671 F.2d 248, 254-55 (7th Cir. 1982), where the defendant raised a due process issue similar to the claim in this case, the court noted that

> the standard to be applied in determining whether the delay in disclosure violates due process is whether the delay prevented defendant from receiving a fair trial. "As long as ultimate disclosure is made before it is too late

> for the defendant [] to make use of any benefits of the evidence, Due Process is satisfied." *United States v. Ziperstein*, 601 F.2d 281, 291 (7th Cir. 1979), *cert. denied*, 444 U.S. 1031, 100 S.Ct. 701, 62 L.Ed.2d 667 (1980).

Id. at 255 (citation omitted); *see also United States v. Weaver*, 882 F.2d 1128, 1141 (7th Cir.) (collecting cases), *cert. denied*, 110 S. Ct. 415 (1989). Here, the government notified defense counsel a week before trial of the existence of the Suarez letter and its contents.[17] The defendants have suggested no particular prejudice in the preparation of their defense. Indeed, the record reveals that the defense, in vigorous cross-examination of Suarez, was able to make good use of the impeaching statements admittedly contained in the letter. Finally, because there is no evidence that the government intentionally destroyed the letter or engaged in any misconduct, we shall not disturb the district court's finding that the government did not act in bad faith. Thus, the fact that Suarez letter was lost does not alter the resolution of this issue. *See United States v. Zambrana*, 841 F.2d 1320, 1341-42 (7th Cir. 1988) (lost or destroyed evidence does not violate due process absent " 'official animus' " or

[17] We have noted that " '[t]here is nothing in *Brady* or *[United States v. Agurs*, 427 U.S. 97 (1976),] to require that such disclosures be made before trial. . . . ' " *United States v. Allain*, 671 F.2d 248, 255 (7th Cir. 1982) (quoting *United States v. McPartlin*, 595 F.2d 1321, 1346 (7th Cir.), *cert. denied*, 444 U.S. 833 (1979)); *see also United States v. Zambrana*, 841 F.2d 1320, 1340 (7th Cir. 1988) (government's failure to disclose exculpatory evidence until just prior to commencement of trial did not violate *Brady*); *Allain*, 671 F.2d at 254-55 (no *Brady* violation where government disclosed evidence favorable to defense on day before trial began).

" 'conscious effort to suppress exculpatory evidence' ") (quoting *California v. Trombetta*, 467 U.S. 479, 488 (1984)).

We also do not believe the district court abused its discretion in denying the defendants' request for a hearing, which was brought as an alternative to their motion to strike. An evidentiary hearing was required only if the defense had presented specific facts raising a significant doubt about the propriety of the government's conduct. *See United States v. Sophie*, 900 F.2d 1064, 1071 (7th Cir. 1990) (defendant claimed government acted in bad faith by violating alleged plea agreement; denial of evidentiary hearing upheld); *United States v. Valona*, 834 F.2d 1334, 1340 (7th Cir. 1987) (alleged misconduct for preindictment delay; no error to deny hearing). In this case, the defendants suggested that there had been government misconduct but offered nothing more in support of that claim than the fact that the letter had been in the government's possession and later could not be found. However, "this alone is insufficient to establish bad faith." *Zambrana*, 841 F.2d at 1343. Because the defendants failed to present sufficient evidence of government misconduct, the district court was not required to conduct a hearing on the issue.

2. Jury deliberations

a. defendants' motion for mistrial

The jury began deliberating on the morning of July 14, 1988. On the second day of deliberations, the jury wrote three notes to the court. At 11:00 a.m. the jury asked whether a defendant who was acquitted on all remaining counts could be found guilty on count one.

Approximately forty-five minutes later, the jury asked how to report a vote that is not unanimous, "[f]or instance a count of eleven guilty [and] 1 not guilty." R.302. While the court and counsel discussed the second note, the court security officer stated that the jurors "feel very strongly that by 2:30 they're going to have a verdict." Tr. at 3697. The court and all counsel agreed at that point that the *Silvern* instruction could be reread to the jury.[18] However, it was not read at that time. A few

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[18] The *Silvern* instruction, which was read to the jury as part of the formal jury instructions, is derived from *United States v. Silvern*, 484 F.2d 879, 883 (7th Cir. 1973) (en banc). The district court in this case gave the instruction as follows:

> The verdict here must represent the considered judgment of each juror. Your verdict, whether it be guilty or not guilty[,] must be unanimous. You should make every reasonable effort to reach a verdict. In doing so you should consult with one another, express your own views and listen to the opinions of your fellow jurors. Discuss your differences with an open mind. Do not hesitate to reexamine your own views and change your opinion if you come to believe it is wrong.
>
> But you should not surrender your honest beliefs about the weight or effect of evidence solely because of the opinions of your fellow jurors or for the purpose of returning a unanimous verdict. The 12 of you should give fair and equal consideration to all of the evidence and deliberate with the goal of reaching an agreement which is consistent with the individual judgment of each juror. You are impartial judges of the facts. Your sole interest is to determine whether the government has proved its case beyond a reasonable doubt.

Tr. at 3715; *see United States v. Byrski*, 854 F.2d 955, 958 n.4 (7th Cir. 1988).

minutes later the court received another note from the marshal stating as follows: "We have a verdict. Also, the jury, on a separate sheet, listed those counts where they were 11-1. This listing is for your eyes. Do you want that list now?" R.302. Yet, another note, the final note, written at 3:15 p.m., stated, "We cannot reach a guilty or not guilty decision on the attached list of counts. Going beyond this point might involve intimidation." R.302. Following receipt of the last note, the court, over defense counsel's objection, reread the *Silvern* instruction to the jury at approximately 4:15 p.m. the jury continued to deliberate until 5:00 p.m., then resumed deliberations and reached a verdict on Monday, July 18.

Based on the jury's note that "[g]oing beyond this point might involve intimidation," R.302, the defendants moved for a mistrial. They now challenge the district court's denial of this motion. They contend that, once the court knew that the jury had reached a verdict on some counts but was split on others, the court was required to take the verdicts and declare the jury partially hung. For the following reasons, we believe the district court was correct in denying defendants' motion.

The district court has broad discretion with regard to declaring mistrials. Our review is limited to whether the denial of a motion for mistrial constituted an abuse of the district court's discretion. *See United States v. D'Antonio*, 801 F.2d 979, 983 (7th Cir. 1986); *see also United States v. Perez*, 870 F.2d 1222, 1227 (7th Cir.), *cert. denied*, 110 S. Ct. 136 (1989). In *United States v. Kwiat*, 817 F.2d 440 (7th Cir.), *cert. denied*, 484 U.S. 924 (1987), the trial involved multiple defendants and lasted for nine days. After only seven hours of deliberation, the jury notified the court

that it could not reach a verdict on some of the charges and thought further deliberations would be " 'fruitless.' " *Id.* at 446. This court determined that, because such circumstances do "not compel a district court to grant a mistrial," it was not an abuse of discretion for the district court to instruct the jury to continue deliberating. *Id.*

Similarly, under " 'all the circumstances of [this] case,' " *D'Antonio*, 801 F.2d at 983 (quoting *United States v. Allen*, 797 F.2d 1395, 1400 (7th Cir.), *cert. denied*, 479 U.S. 856 (1986)), a mistrial was not compelled by the fact that the jury thought it was deadlocked. Here, the jury had deliberated for less than two days – approximately twelve hours – following a trial had extended over five weeks and involved six defendants and twenty-three counts. The district court "has great discretion to determine how long deliberations should continue." *Kwiat*, 817 F.2d at 446. That discretion was not abused in this case. We therefore shall not disturb the court's refusal to declare a mistrial.

b. the *Silvern* instruction

Finally, the defendants assert that the district court erred by the rereading the *Silvern*, instruction, particularly in light of the fact that the court knew the jury was split eleven to one on some counts. We rejected this same argument in *United States v. Gabriel*, 597 F.2d 95 (7th Cir.), *cert. denied*, 444 U.S. 858 (1979). There, we concluded that the district court did not abuse its discretion by rereading the *Silvern* charge when the jury indicated that it was deadlocked after less than three hours of deliberation following six day trial. In *Gabriel*, as here, the district

court knew that the jury was split eleven to one against the defendant. *Id.* at 100. Similarly, in *Kwiat*, where the jury thought it was deadlocked after less than three hours of deliberation following a nine day trial, the district court's decision to reread the *Silvern* charge was upheld as within that court's sound discretion. 817 F.2d at 446; *see also United States v. Byrski*, 854 F.2d 955, 962 n.11 (7th Cir. 1988) (no abuse of discretion where court repeated *Silvern* charge *twice*).[19] Under the facts of this case, we conclude that the district court did not abuse its discretion by giving the *Silvern* charge. The instruction read here was "perfectly content-neutral and carried no plausible potential for coercing 'the jury to surrender their honest opinions for the mere purpose of returning a verdict.' " *D'Antonio*, 801 F.2d at 983-84 (quoting *United States v. Thibodeaux*, 758 F.2d 199, 203 (7th Cir. 1985)).

B. *Individual Appeals*

1. Alex Beverly

a. continuing criminal enterprise charge

Mr. Beverly first alleges error in the jury instructions. He claims that he did not organize, supervise, or manage

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[19] *Cf. United States v. D'Antonio*, 801 F.2d 979, 983 (7th Cir. 1986) (jury indicated inability to reach a verdict after only three hours of deliberation; no abuse of discretion where court sent jury a note ordering further deliberations rather than rereading *Silvern* instruction). We reject the defendants' claim to the extent that it attacks the district court's decision to *read* the *Silvern* charge rather than respond to the jury in writing. *See United States v. Cheek*, 882 F.2d 1263, 1268 (7th Cir. 1989) (character of additional instructions rests within district court's sound discretion), *cert. granted on other grounds*, 110 S. Ct. 1108 (1990).

Peter Suarez within the meaning of the continuing criminal enterprise (CCE) statute, 21 U.S.C. § 848.[20] He therefore argues that the jury should have been instructed that Suarez could not be considered for purposes of the CCE count. Mr. Beverly claims only that he did not organize, supervise, or manage Suarez; he does not deny that he occupied such a position with respect to at least five people. Therefore, this court's decision in *United States v. Holguin*, 868 F.2d 201, 202-04 (7th Cir.), *cert. denied*, 110 S. Ct. 97 (1989), disposes of Mr. Beverly's claim. Based on our review of the record, we determine that there was sufficient evidence presented at trial to establish that he in fact organized, supervised, or managed at least five

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[20] To engage in a CCE, the defendant must occupy "a position of organizer, a supervisory position, or any other position of management" with respect to at least five other persons. 21 U.S.C. § 848. To prove a violation of § 848, the government must show:

> (1) a predicate offense violating a specified drug law (2) as part of a "continuing series" of drug violations (3) that occurred while the defendant was acting in concert with five or more people (4) to whom the defendant occupied the position of an organizer or manager and from which series the defendant (5) obtained substantial income or resources.

United States v. Sophie, 900 F.2d 1064, 1077 (7th Cir. 1990) (quoting *United States v. Markowski*, 772 F.2d 358, 360-61 (7th Cir. 1985), *cert. denied*, 475 U.S. 1018 (1986)). Mr. Beverly challenges the third and fourth elements. The court did not identify who *could* be considered for purposes of this count, but instructed the jury not to consider Diane Griffin, Johnny Davis, or Officer Milton.

individuals.[21] "That determination ends our inquiry." *Id.* at 204. It is irrelevant whether the evidence was insufficient to establish that Mr. Beverly acted in concert with Suarez. *See id.* at 203.

Mr. Beverly also attacks the district court's denial of his request that the jury be required, by the use of special interrogatories, to identify specifically the persons it found Mr. Beverly had organized, supervised, or managed. However, it is well settled that the law "does not make the identify of the five important." *United States v. Markowski*, 772 F.2d 358, 364 (7th Cir. 1985), *cert. denied*, 475 U.S. 1018 (1986). Therefore, a CCE conviction will stand where those who were organized, supervised, or managed are unidentified. *See id.* ("the CCE statute is directed against all enterprises of a certain size; the identity of those involved is irrelevant.") *see also Holguin*, 868 F.2d at 203 & n.5 (government not required to prove the identity of five or more persons organized by defendant); *United States v. Moya-Gomez*, 860 F.2d 706, 747 (7th Cir. 1988) (quoting *Markowski*), *cert. denied*, 109 S. Ct. 3221 (1989). Because the evidence was sufficient to establish that Mr. Beverly acted in concert with at least five people, we affirm the CCE conviction.

b. district court rulings

Mr. Beverly challenges three evidentiary rulings made during the trial. Our review of the district court's

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[21] Such persons include, at least, Betty McNulty; George Brown; Willie Jordan; Charles Avant; and Mary Pugh, the woman who kept at her house the cash Mr. Beverly used to pay for a kilogram of cocaine on October 18, 1986.

rulings is limited to whether the court abused its discretion. *See United States v. Nedza*, 880 F.2d 896, 903 (7th Cir.), *cert. denied*, 110 S.Ct. 334 (1989). Mr. Beverly carries "a heavy burden in challenging the trial court's evidentiary rulings on appeal because ' "a reviewing court gives special deference to the evidentiary rulings of the trial court." ' *United States v. Shukitis*, 877 F.2d 1322, 1327 (7th Cir. 1989) (citation omitted)." *United States v. Briscoe*, 896 F.2d 1476, 1489-90 (7th Cir. 1990). We therefore shall uphold such rulings unless the defendant demonstrates that the district court abused its discretion. *Id.* at 490.

Mr. Beverly claims first that the district court erroneously barred the testimony of Dr. Chester Layne. Had he been permitted to take the stand, Dr. Layne would have testified that (1) he sought professional help for his cocaine addition as a result of Mr. Beverly's counseling, and (2) he never saw Mr. Beverly buy or sell cocaine outside of Somons Lounge. This matter needs little elaboration. As the district court recognized, hearsay problems aside, the evidence simply was not relevant. The testimony would have revealed nothing about Mr. Beverly's activities at Somons. Moreover, Mr. Beverly undoubtedly could have called any number of additional witnesses to testify that they never had purchased cocaine from him. Such proof of an assertion by a negative is inadmissible.[22] Accordingly, the district court did

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[22] *See United States v. Troutman*, 814 F.2d 1428, 1454 (10th Cir. 1987) (defendant indicted for extortion of specific company offered evidence that he had not extorted other companies; evidence properly excluded as irrelevant). Moreover, even relevant evidence may be excluded in some instances. *See* Fed. R.

(Continued on following page)

not abuse its discretion by excluding Dr. Layne's testimony.[23]

Mr. Beverly next contends that the government failed to show that the DEA properly connected the pen register used to monitor the phone line at Somons Lounge and that the district court therefore improperly introduced evidence obtained through its use. This claim has no merit. The government laid an ample foundation for the introduction of this evidence through the director of technical operations for the Chicago office of the DEA. Although the director personally did not install the device used in this case, he testified that the installation procedure was standardized throughout the United States and that he had never known the DEA to misconnect a pen register. Moreover, the tape printed out by the device indicated that it was in fact connected to the

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Evid. 403. Here, "[t]he relevance of the offered proof to the charges against [the defendant] is so tenuous that the district judge was entitled to conclude that its probative value would be clearly outweighed by its effect in confusing the jury by extending an already very long trial. Fed. R. Evid. 403." *United States v. LaFevour*, 798 F.2d 977, 980 (7th Cir. 1986).

[23] Mr. Beverly's claim also fails to the extent that he argues Dr. Layne's testimony was admissible as character evidence. This argument was not made to the district court and cannot be made now. *See United States v. Nedza*, 880 F.2d 896, 904 (7th Cir.), *cert. denied*, 110 S. Ct. 334 (1989). In addition, Mr. Beverly's character was not an essential element in this case; character evidence may not be proved by specific instances of conduct, such as Mr. Beverly sought to introduce through Dr. Layne, unless character of a person is "an essential element of a charge, claim or defense." Fed. R. Evid. 405(b).

phone line serving Somons Lounge. Accordingly, we conclude that the district court did not abuse its discretion by admitting evidence derived from the pen registers.

In his final challenge to the district court's evidentiary determinations, Mr. Beverly claims that Burl Price improperly was allowed to testify to hearsay statements. Price testified that (1) he sold a building to Haley Rainey under a land contract, (2) when Rainey made the final payment in 1980 or 1981, he told Price that he was selling the building to someone else, and (3) when Price received a notice of delinquent taxes on the property, he called Alex Beverly, who picked up the notice and said he would take care of it. Mr. Beverly argues that Price's second statement constituted impermissible hearsay. Although this testimony encompasses out of court statements between Price and Rainey, the district court determined that those statements were not offered to prove the truth of the matter asserted. We agree and conclude that the government's use of the testimony – to explain why Price contacted Mr. Beverly about the tax notice – was permissible. *See* Fed. R. Evid. 801(c); *see also Lee v. McCaughtry*, 892 F.2d 1318, 1324 (7th Cir.) (statements introduced "merely to give the context of the defendant's statements are not hearsay"), *cert. denied*, 110 S. Ct. 3244 (1990). Moreover, the court directed the jury to consider the challenged testimony only as an explanation of Price's subsequent actions and not for the truth of the contents of his conversation with Rainey. Because there is not an "overwhelming probability" that the jury in this case was unable to follow the court's limiting instruction, the jury must be presumed to have followed it. *See Greer v. Miller*, 483 U.S. 756, 766 n.8 (1987); *Lee*, 892 F.2d at 1325.

Mr. Beverly also challenges the denial of several motions made after he discovered that telephone calls recorded in a separate investigation might contain his statements.[24] His attorney asked to hear the tapes and requested a continuance to do so. Following an *in camera* review of the tapes, the district court concluded that they were not discoverable and denied the requests for discovery and for a continuance. Whether to grant such motions rests within the sound discretion of the district court. *See United States v. Dougherty*, 895 F.2d 399, 405 (7th Cir.) (denial of continuance will not be reversed unless district court abused its discretion), *cert. denied*, 110 S. Ct. 3249 (1990); *United States v. Mitchell*, 778 F.2d 1271, 1276 (7th Cir. 1985) (reversal warranted only if court abused its discretion in denying discovery). Moreover, to prevail, the defendant must show that "actual prejudice resulted from the denial." *United States v. Turk*, 870 F.2d 1304, 1307 (7th Cir. 1989).

The district court listened to the tapes and determined that they were irrelevant to the case and thus were not discoverable. Accordingly, the court ruled that Mr. Beverly was not entitled to a continuance to examine the

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[24] Mr. Beverly also claimed that the court abused its discretion in denying a continuance based on the government's failure to meet several deadlines set by the court. The government concedes that not all court orders were met on time, but it objected to continuances because the defense was not harmed by the delays. Indeed, the court denied the motion based on lack of prejudice to the defendants. That conclusion was well within the district court's discretion and is supported by the record. *See United States v. Dougherty*, 895 F.2d 399, 405 (7th Cir.) (continuance properly denied where such denial did not prejudice defendants), *cert. denied*, 110 S. Ct. 3249 (1990).

tapes. We have reviewed transcripts of the tapes[25] and agree with the district court. The tapes do not contain evidence relevant to either the charges against Mr. Beverly in this case or to his theory of defense. Nor were the tapes discoverable on the basis of Fed. R. Crim. P. 16(a), which requires the government to disclose only "*relevant* written or recorded statements made by the defendant." *Id.* (emphasis supplied). Moreover, our review of the record reveals no prejudice to Mr. Beverly. He claims nevertheless that his decision of whether to testify was impaired by the prospect of cross-examination based on his unknown statements. We disagree; the district court's ruling clearly was based on the tapes' lack of relevance. Statements from them were not available for purposes of cross-examination for the same reason the government was not required to produce them. The district court acted within its discretion on this matter. We therefore affirm the denial of Mr. Beverly's motions.

2. Betty McNulty

a. entrapment

Ms. McNulty first claims that she was not predisposed to commit a drug crime and thus was entrapped by Johnny Davis into obtaining and selling cocaine. As we recently stated in *United States v. Rivera-Espinoza*, No. 89-1688, slip op. at 4 (7th Cir. June 15, 1990):

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[25] The district court examined these transcripts, determined that they were accurate, and had them filed under seal as part of the record.

> [t]he principles surrounding the defense of entrapment are well-established. A defendant who wishes to assert the entrapment defense must produce not only evidence of the government's inducement, but also evidence of his own lack of predisposition. Once this has been accomplished, the burden shifts to the government to prove beyond a reasonable doubt that the defendant was in fact predisposed or that there was not government inducement.

See also United States v. Franco, No. 89-1703, slip op. at 3-4 (7th Cir. Aug. 9, 1990); *United States v. Carrasco*, 887 F.2d 794, 814 (7th Cir. 1989); *United States v. Fusko*, 869 F.2d 1048, 1051 (7th Cir. 1989). At trial, the government convinced the jury that Ms. McNulty was predisposed to sell cocaine. On appeal, she challenges only the evidence on this issue, which is characterized as the " 'principle element' " in the entrapment defense. *Mathews v. United States*, 485 U.S. 58, 63 (1988) (quoting *United States v. Russell*, 411 U.S. 423, 433 (1973)). This element focuses on "whether the defendant was an 'unwary innocent' or instead, an 'unwary criminal' who readily availed himself of the opportunity to perpetrate the crime." *Id.* (quoting *Russell*, 411 U.S. at 436). In assessing whether a defendant was predisposed to commit a crime, we examine several relevant factors:

> (1) the character and reputation of the defendant, including any previous criminal record; (2) whether the suggestion of the criminal activity was originally made by the government; (3) whether the defendant was engaged in criminal activity for profit; (4) whether the defendant expressed reluctance to commit the offense which was overcome only by repeated government inducement or persuasion; and (5) the

nature of the inducement or persuasion applied by the government.

Rivera-Espinoza, slip op. at 4-5 (quoting *United States v. Lazcano*, 881 F.2d 402, 406 (7th Cir. 1989)); *see United States v. Perez-Leon*, 757 F.2d 866, 871 (7th Cir.), *cert. denied*, 474 U.S. 831 (1985). None of these factors, considered alone, are determinative. *Franco*, slip op. at 4; *Perez-Leon*, 757 F.2d at 871. We shall affirm the jury's verdict if any rational trier of fact could have found the requisite predisposition beyond a reasonable doubt. *Rivera-Espinoza*, slip op. at 5.

Examining the evidence adduced at trial in light of these factors, we conclude that a rational juror could have found that Ms. McNulty was predisposed to sell cocaine. The evidence of her character and reputation is inconclusive. She had no prior record, although she admitted to Davis that she previously had obtained drugs for a friend. *See Carrasco*, 887 F.2d at 815. She also illustrated her "sophistication and knowledge of the drug business by stating [to the buyer] that the price . . . was a good one," *Perez-Leon*, 757 F.2d at 872, and demonstrated that she was "not unfamiliar with 'the business' for which" she was convicted, *Rivera-Espinoza*, slip op. at 5, by using terms of art and informing Davis that he would get more for his money if he purchased the cocaine in powder form. With regard to the next factor, it is undisputed that the government, through Davis, approached Ms. McNulty with the request to purchase some cocaine. However, " 'mere solicitation by itself by a government agent is not sufficient to establish the entrapment defense.' " *Id.* (quoting *Perez-Leon*, 757 F.2d at 872). Third, it is unclear from the record whether Ms. McNulty sold

cocaine to Davis for profit. In both transactions, Ms. McNulty was very careful to recount the money Davis paid her. The evidence does not reveal that "profit" was ever mentioned, although "we can assume that a person who operates in a chain of cocaine distribution does not do so at a financial loss." *Id.*

The fourth factor is the most important in the predisposition equation. *Id.* at 6; *United States v. Marren*, 890 F.2d 924, 930 (7th Cir. 1989); *Carrasco*, 887 F.2d at 815; *Perez-Leon*, 757 F.2d at 871. In this case, it is clear that Ms. McNulty did not exhibit reluctance and was not cajoled into supplying Johnny Davis with cocaine. After he initially requested to purchase some cocaine and said he wanted a good price, Ms. McNulty did not turn him down. To the contrary, she directed him to leave his telephone number and indicated that she could give him a price of $900 for half an ounce of cocaine. This conversation took place in person at the Blacom office, prior to the telephone calls Ms. McNulty claims were used to entrap her. When she indicated several days later that she was having trouble obtaining the cocaine from her source, she did not abandon this project, but expressed her willingness to pursue the transaction. Moreover, she was very solicitous in advising Davis to purchase the cocaine in powder form for the best value and in demonstrating how to carry it to minimize its attraction as something of value.

Finally, the nature of the government's inducement was in dispute. The government contends that Ms. McNulty responded willingly and knowledgeably to Davis' purchase request; the defendant asserts that she obtained and sold the cocaine only after being persuaded

by "flagrant coercive tactics." McNulty's Br. at 3. Balanced against the evidence described above, which is favorable to the government's position, is the single occasion on which Ms. McNulty expressed reluctance about the transactions. During the fourth contact with Davis (the second telephone call of August 11, 1986), Ms. McNulty commented that she was not sure she should set up the sale yet. However, the record makes clear that Ms. McNulty made this comment because she was angry with Davis for personal reasons unrelated to the narcotics transaction.[26] We note that "[t]his, like the other factors considered in this five-factor test, was a question of fact which was properly submitted to the jury. The jury, as was its prerogative, chose to believe the testimony presented by the government." *Rivera-Espinoza*, slip op. at 6 (citation omitted); *see Perez-Leon*, 757 F.2d at 872. Based on our review of the record and in light of the five factors discussed above, we conclude that there was more than enough evidence to support the jury's conclusion that Ms. McNulty was predisposed to obtain and sell cocaine and, as such, was not entrapped.

Ms. McNulty also maintains that the district court abused its discretion in responding to the jury's request for further direction on the entrapment issue. At approximately 2:00 p.m., the jury inquired whether there was any guidance, other than the jury instructions, to help determine whether Betty McNulty had been entrapped. Ms. McNulty retendered her initial instruction on entrapment, which had been rejected in favor of the government's similar proffer, and asked that it be given as a

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[26] *See supra* p. 8.

supplemental instruction. Upon the government's objection,[27] Ms. McNulty abandoned her request for additional instruction and instead asked the court to refer the jury to the entrapment instruction originally read; the court did so.

Notwithstanding the fact that she waived any claim on this issue but one predicated on plain error by failing to object to the original entrapment instruction or to the court's decision to refer the jury to that instruction rather than give an additional charge,[28] we determine that her claim is without merit. As we said in *United States v. Cheek*, 882 F.2d 1263, 1268 (7th Cir. 1989), *cert. granted on other grounds*, 110 S. Ct. 1108 (1990), reinstruction is merely *appropriate* "[o]nce it is clear that a jury has difficulties concerning the original instructions." We also made clear that "whether or not to give reinstruction at all is within the discretion of the trial court," as is the "character and extent of supplementary instructions." *Id.*; *see also United States v. Franco*, 874 F.2d 1136, 1143 (7th Cir. 1989); *United States v. Mealy*, 851 F.2d 890, 901-02 (7th Cir. 1988). In this case, the court acted well within its discretion in refusing to read an instruction it already had rejected and in instructing the jury to continue their deliberations in light of the instructions given. We find no

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[27] The government argued that the jury would be confused by additional instruction because the instruction given on entrapment and Ms. McNulty's proffered supplemental instruction were phrased differently but carried the same meaning.

[28] *See United States v. Valencia*, No. 89-1235, slip op. at 14 (7th Cir. July 16, 1990) (court reviews instruction only for plain error where defendant failed to object to trial).

reversible error in this decision. *See Mealy*, 851 F.2d at 902 (if original jury charge clearly and correctly states applicable law, district court may properly answer jury's question "by instructing the jury to reread the instructions").

b. conspiracy conviction

Ms. McNulty was convicted of violating 18 U.S.C. § 371, conspiracy to defraud the United States. The crime was charged as a dual-objective conspiracy; the first alleged goal was to impede the IRS in computing taxes (the tax object), and the second was to impede the DEA in ascertaining forfeitable assets (the drug object). On appeal, Ms. McNulty challenges the sufficiency of the evidence with respect to only her knowledge of the tax object of the conspiracy. She also claims that the jury's general verdict is ambiguous and must be reversed.

As will be seen below, a general verdict in a dual-object conspiracy case is problematic under some circumstances. Such an instance is not presented here. Rather, Ms. McNulty's appeal is disposed of by the general rule that "when a jury returns a guilty verdict on an indictment charging several acts in the conjunctive, . . . the verdict stands if the evidence is sufficient with respect to any one of the acts charged." *Turner v. United States*, 396 U.S. 398, 420 (1970); *accord United States v. Bucey*, 876 F.2d 1297, 1312 (7th Cir.), *cert. denied*, 110 S. Ct. 565 (1989). Here, Ms. McNulty's conspiracy conviction will be affirmed because she does not contest that the jury could convict her under the DEA objective. *See United States v. Soteras*, 770 F.2d 641, 646 (7th Cir. 1985) (citing *United States v. Alvarez*, 735 F.2d 461, 465-66 (11th Cir. 1984)

(conviction may be upheld under unchallenged objective where dual-objective conspiracy is charged and evidence is claimed to be insufficient as to only one objective)).

Moreover, Ms. McNulty's claim regarding the general verdict is merely an attack on the sufficiency of the evidence. However, the record amply supports her conviction under the IRS objective. To establish a violation of section 371, the government must show that a defendant "'"agreed to interfere with or obstruct one of [the government's] lawful functions by deceit, craft or trickery, or at least by means that are dishonest."'" *Bucey*, 876 F.2d at 1312 (citations omitted). Where the sufficiency of the evidence is challenged, "[w]e may overturn a verdict only when the record is devoid of any evidence, regardless of how it is weighed, from which a jury could find guilt beyond a reasonable doubt." *United States v. Durrive*, 902 F.2d 1221, 1225 (7th Cir. 1990); *see also United States v. Valencia*, No. 89-1235, slip op. at 7 (7th Cir. July 16, 1990).

The government in this case produced sufficient evidence for the jury reasonably to infer that Ms. McNulty was part of a conspiracy to impede the IRS: on her 1985 tax return, Ms. McNulty claimed Somons as a sole proprietorship. There is no evidence that she was involved with the lounge in any way, although the jury heard evidence that Somons was Mr. Beverly's business. Given the fact that Ms. McNulty had not filed tax returns in the immediately preceding years, the jury was entitled to conclude that she filed the 1985 return and claimed Somons as her own in an attempt to conceal from the IRS the true owner. Moreover, the jury properly could conclude that Ms. McNulty allowed Mr. Beverly to place goods (she was the titleholder to the Mercedes Benz Mr. Beverly purchased),

to place property (she was the lessee on two leases negotiated by Mr. Beverly and the named grantee on the deed to at least one parcel of real estate), and to make expenditures (Mr. Beverly's American Express account was paid exclusively with checks from her checking account) in her name in an effort to defraud the IRS.[29]

3. George Brown

a. guilty verdict

Mr. Brown claims first that the government failed to produce sufficient evidence to sustain either the conspiracy charge or the substantive possession counts because (1) Peter Suarez was an incredible and unreliable witness, (2) the only evidence against Mr. Brown was provided by Suarez and was uncorroborated, and (3) most of the evidence was circumstantial. It is well settled both that a reviewing court will not disturb a jury's credibility findings, *see, e.g., United States v. Edun*, 890 F.2d 983, 988-89

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[29] Thus, Ms. McNulty's reliance on *Yates v. United States*, 354 U.S. 298, 311-12 (1957), *overruled on other grounds, Burks v. United States*, 437 U.S. 1 (1978), and its progeny is misplaced. This is not a case where two objects of a conspiracy were charged and there is a legal insufficiency with respect to one of the objects, placing the legality of the conviction under a general verdict in question *See id.* (statute of limitations had run on one of the charged objectives). As noted above, Ms. McNulty does not challenge the DEA object of the conspiracy and there was sufficient evidence for the jury to convict her under the tax object. As such, the general verdict was permissible.

(7th Cir. 1989),[30] and that a conviction may rest solely on circumstantial evidence, *see, e.g., United States v. Durrive*, 902 F.2d 1221, 1225 (7th Cir. 1990). This is true even when the evidence at trial is "totally uncorroborated and comes from an admitted liar, convicted felon, large scale drug-dealing, paid government informant," as the defendant claimed in *United States v. Molinaro*, 877 F.2d 1341, 1347 (7th Cir. 1989). We responded in *Molinaro*, as we do today, that "[t]his argument is wasted on an appellate court; [the defendant] thoroughly attacked [the witness'] credibility at trial and the jury, which is the only entity entitled to make such credibility determinations, apparently decided to believe [the witness'] testimony despite his many character flaws." *Id.; see United States v. Mejia*, No. 89-2243, slip op. at 4 (7th Cir. Aug. 2, 1990) (rejecting defendant's sufficiency claim, which was based on argument that government witness' testimony was inherently unreliable). Thus, even if uncorroborated and circumstantial, Suarez' testimony that Mr. Brown sold cocaine from the Mayfield house and assisted in the drug transactions between Mr. Beverly and Suarez was sufficient to support the jury verdicts.

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[30] *But see United States v. Grandinetti*, 891 F.2d 1302, 1307 (7th Cir. 1989) (jury determinations of testimonial truth upheld unless testimony is incredible as a matter of law), *cert. denied*, 110 S. Ct. 1534 (1990); *United States v. Dunigan*, 884 F.2d 1010, 1013 (7th Cir. 1989) (verdicts based solely on accomplice's uncorroborated testimony upheld unless testimony is incredible as a matter of law). However, "[m]ere inconsistencies in the witness' testimony do not render it legally incredible." *Dunigan*, 884 F.2d at 1013.

Moreover, Mr. Brown's position ignores the fact that the evidence against him was not wholly uncorroborated. Suarez testified that he sold cocaine to Mr. Beverly and Mr. Brown in Chicago on ten separate occasions between April and November of 1986. The government introduced various records from airlines, hotels, and car rental agencies to document Suarez' presence in Chicago on seven of those ten instances.[31] The government also introduced drug paraphernalia, recovered from Mr. Brown's apartment, that was identified as equipment used by drug dealers rather than mere drug users.[32]

b. sentencing

Mr. Brown asserts that the district court erred in finding that he was second in command of the drug enterprise. He claims that, because the court sustained his objection to Suarez' description of him as Mr. Beverly's "righthand man," Tr. at 739-40, the court concluded "that there was nothing in the record to indicated [sic] Wes Brown was a right hand man and that he held any possession [sic] of authority in the organization," Brown's Br. at 13. We cannot say that the district court abused its discretion in finding that Mr. Brown held a position of high

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[31] As noted above, Mr. Brown was acquitted of the charges stemming from the three occasions on which the government was unable to demonstrate that Suarez had travelled to the city.

[32] We recently noted in *United States v. Valencia*, No. 89-1235, slip op. at 10 (7th Cir. July 16, 1990), that "[t]he intent to distribute drugs has been inferred from . . . possession of drug-packaging paraphernalia."

authority in the drug conspiracy. The decision to sustain the objection during trial means only that it was improper to portray Mr. Brown as Mr. Beverly's "righthand man"; it clearly does not mean that the court made a factual determination that Mr. Brown did not play a key role in the enterprise. Moreover, Mr. Brown's claim ignores evidence, the bulk of which came after the objection, from which the court properly could determine that he was more than just the "errand boy" he claims to have been. Brown's Br. at 13. Suarez stated without objection that, during a meeting to discuss cocaine, Mr. Beverly introduced Mr. Brown as a "close associate, brother like." Tr. at 730. The court heard testimony the Mr. Brown took part in nearly every drug transaction between Mr. Beverly and Suarez. Mr. Brown handled the money used to purchase cocaine, retrieved large quantities of the drug following the transactions, and returned with the narcotics to the Mayfield house. There also was testimony that he sold packages of "white powder" to customers at the Mayfield house for $50 and $100, then converted the powder to rock form for the customers to smoke. Tr. at 746. Based on this evidence, the court certainly did not abuse its discretion in concluding that Mr. Brown played more than a peripheral role in the organization and that he "ran at least one of the smoke houses." Sentencing Tr. at 49. Finally, the court's sentence was based in part on the fact that Mr. Brown had prior contacts with the law and "seem[ed] to have learned no lesson." *Id.* at 50. These were proper considerations and reveal that the district court exercised its discretion. Accordingly, the sentence is affirmed. *See United States v. Briscoe*, 896 F.2d 1476, 1519 (7th Cir. 1990).

Mr. Brown argues in the alternative that, even if the basis of his sentence was proper, the district court imposed disparate sentences. This claim also lacks merit. As a general matter, a sentence will not be overturned on appeal absent an abuse of the district court's discretion. *United States v. Goot*, 894 F.2d 231, 237 (7th Cir. 1990). "A mere showing of disparity in sentences among codefendants does not, without more, demonstrate any abuse of discretion." *United States v. Marren*, 890 F.2d 924, 937 (7th Cir. 1989). " 'Only when a judge imposes disparate sentences on *similar* defendants without explanation does even an inference if impropriety arise.' " *Briscoe*, 896 F.2d at 1519 (quoting *United States v. Neyens*, 831 F.2d 156, 159 (7th Cir. 1987)) (emphasis in *Neyens*).

Here, it is clear that the district court did not abuse its discretion. The defendants were convicted of different crimes and thus were not "similar." *See id*. Moreover, the court explained why it imposed each sentence and why some sentences were harsher than others. Mr. Beverly was sentenced to thirty-five years because of his prior record and the fact that he was "the ring leader of this . . . very profitable narcotics organization from 1979 through '87." Sentencing Tr. at 47. In Mr. Brown's case, the court considered his prior record and the fact that he had been part of the enterprise for at least eight years, that he ran at least one of the smoke houses, that he aided the transactions between Mr. Beverly and Suarez, and that guns were found in his apartment. *See supra* p. 20; *see also* Sentencing Tr. at 50 ("in light of the fact that you've had contact with the law before and you seem to have learned no lesson, it's appropriate that the Court sentence you . . . to a period of 20 years"). Betty McNulty received

a lighter sentence because she had no prior record and her role in the conspiracy was "much less than the involvement of Mr. Brown or Mr. Alex Beverly, who ran the organization." Sentencing Tr. at 50-51. Finally, Ms. Griffin, who also had a clean record, had "the least involvement" in the enterprise and thus received the lightest sentence. *Id*. at 52. These considerations demonstrate that the court "had a principled basis for sentencing [Mr. Brown] to a stiffer penalty." *Marren*, 890 F.2d at 937. The court contemplated each sentence imposed and thoroughly explained any disparity among the sentences. Thus, not even an inference of impropriety arises. *See Briscoe*, 896 F.2d at 1519. Accordingly, Mr. Brown's sentence is affirmed.

4. Diane Griffin

a. sufficiency of evidence

Like Ms. McNulty, Ms. Griffin was found guilty on the dual-objective conspiracy charge. She claims first that the evidence was insufficient to support her conviction. As noted above, the verdict will be upheld unless there is no evidence from which the jury could find guilt beyond a reasonable doubt. *See United States v. Durrive*, 902 F.2d 1221, 1225 (7th Cir. 1990). Because this case was tried to a jury, "we must on review defer to reasonable inferences drawn by the jury and the weight it gave to the evidence. Likewise, we leave the credibility of witnesses solely to the jury's evaluation, absent extraordinary circumstances." *United States v. Hogan*, 886 F.2d 1497, 1502 (7th Cir. 1989) (citation omitted). With regard to the conspiracy charged in this case, "[i]t is fundamental that a

conviction for conspiracy under 18 U.S.C. § 371 cannot be sustained unless there is 'proof of an agreement to commit an offense against the United States.' " *Ingram v. United States*, 360 U.S. 672, 677-78 (1959) (quoting *Pereira v. United States*, 347 U.S. 1, 12 (1954)).

Because the government concedes that there was no evidence to support a conviction under the DEA arm of the conspiracy, the verdict can be upheld only if there was sufficient evidence to establish that Ms. Griffin knowingly allowed Mr. Beverly to put assets in her name in order to impede the IRS in ascertaining Mr. Beverly's taxable income. We conclude that there was. The record supports that Ms. Griffin (1) allowed Mr. Beverly to put property he owned in her name, (2) filed a false tax return claiming Mr. Beverly's income as her own, and (3) used Mr. Beverly's money to purchase a car in her name. Moreover, a rational jury could have found that at least two of Ms. Griffin's actions are "reasonably explainable only in terms of motivation to evade taxation," *id.* at 679. First, the jury could have found that Mr. Beverly actually owned Tit's[33] and that Ms. Griffin filed tax returns claiming it as her own in order to conceal his ownership. The jury also could have determined that Ms. Griffin underreported the income from Tit's as part of the scheme: she claimed that the income from Tit's, a cash lounge, was

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[33] The evidence revealed that the bar had been purchased in Ms. Griffin's name, but Mr. Beverly purchased the building that housed Tit's and paid for its complete renovation and furnishings. He also took several thousand dollars from the cash register on at least one occasion. Moreover, Ms. Griffin did not tell Johnny Davis that she owned the bar but responded that it was "[hers] to run." Tr. at 209.

only $5,459 in 1985, yet Suarez testified that on one occasion alone Mr. Beverly took $2,000 from the cash register at Tit's to purchase cocaine.

Second, the manner in which the $35,000 Jaguar was purchased in 1985 is indicative of the unlawful motivation to impede the IRS: as noted above, an initial down payment of $500 in cash was made on the car on September 16. A $7,000 payment was made on September 23 by check, followed by cash payments on September 30 ($8,000), October 1 ($7,000), October 2 ($6,000), and October 3 ($7,186). Paid over a short period of time and largely in cash, the purchase was structured such that the reporting requirement regarding cash payments in excess of $10,000 was not triggered. *See* 26 U.S.C. § 6050I; *see also United States v. Bucey*, 876 F.2d 1297, 1306 n.17 (7th Cir.), *cert. denied*, 110 S. Ct. 565 (1989). A jury was entitled to find on this evidence that Ms. Griffin intended to impair the IRS in assessing Mr. Beverly's taxes.

Relying on *Ingram* and *United States v. Krasovich*, 819 F.2d 253 (9th Cir. 1987), Ms. Griffin asserts that the government was required to prove more than the hiding of assets because her conduct may be explained by motives other than a desire to impede the IRS. For example, she may have been helping Mr. Beverly conceal his gambling, or she could have been merely a girlfriend willing to accept real estate, a business, a bank account, and a luxury car from her "sugar daddy." Griffin's Br. at 32. Her reliance on these cases is misplaced. In *Ingram*, where income from illegal gambling activity was concealed, there was not evidence that the defendants were aware of any tax liability. 360 U.S. at 677. Here, the jury could infer that Tit's actually belonged to Mr. Beverly and that Ms.

Griffin was aware of his tax liability from the bar because she filed tax returns regarding that asset. Thus, unlike the evidence in *Ingram*, the evidence adduced in this trial was not remote. *See Hogan*, 886 F.2d at 1503. In *Krasovich*, the defendant hid the true ownership of a pickup truck by registering the truck in his own name, although he never filed a tax return claiming ownership of the vehicle or otherwise indicated that it was his. 819 F.2d at 254. Thus, "[n]othing in the circumstances of the transaction suggest[ed] that [he] knew that the purpose of the concealment was to evade taxes." *Id.* at 256. Here, on the other hand, Ms. Griffin allowed assets to be purchased in her name and represented to the government in her tax return that she owned Tit's bar.

Moreover, to prove a conspiracy, not every reasonable hypothesis of innocence need be excluded; the total evidence must allow the jury to conclude that the defendant is guilty beyond a reasonable doubt. *See United States v. Khorrami*, 895 F.2d 1186, 1191 (7th Cir. 1990); *United States v. Grier*, 866 F.2d 908, 923 (7th Cir. 1989). In *United States v. Pace*, 898 F.2d 1218, 1236 (7th Cir.), *cert. denied*, 110 S. Ct. 3286 (1990), the defendant maintained that the evidence failed to support the forfeiture of money found in his home because the circumstances indicated that the cash was related to his gambling activities rather than any narcotics transaction. Our holding there is equally applicable in this case. We stated that, "while the jury could have inferred that the money was related to gambling, not cocaine, the jury could have also inferred that the money was related to the cocaine transaction. The choice of which inference to draw was for the jury, and we will not disturb that choice." *Id.* Accordingly,

we conclude that the record supports the jury's conclusion that Ms. Griffin conspired to impede the IRS in ascertaining Mr. Beverly's taxable income.

b. general verdict

Our inquiry with regard to Ms. Griffin's conviction does not end with the determination that the evidence supports the jury's verdict. Ms. Griffin also claims that she is entitled to a new trial based on the verdict form. She maintains that, because the jury returned a general verdict, it is impossible to determine whether she was convicted for conspiracy to defraud the IRS – for which there is sufficient evidence – or for conspiracy to defraud the DEA – which the government failed to prove.

There have been a number of Supreme Court and appellate decisions on the problems that stem from general verdicts. The critical factor in many of these cases is whether the appellant's claim is based on an alleged legal insufficiency or an alleged factual insufficiency. As noted above, "[t]he general rule is that when a jury returns a guilty verdict on an indictment charging several acts in the conjunctive, . . . the verdict stands if the evidence is sufficient with respect to any one of the acts charged." *Turner v. United States*, 396 U.S. 398, 420 (1970). This rule does not hold true, however, when a general jury verdict renders it impossible to say whether a defendant was convicted on an unconstitutional or legally invalid ground. Thus, the conviction must "be set aside in cases where the verdict is supportable on one ground, but not on another, and it is impossible to tell which ground the jury selected." *Yates v. United States*, 354 U.S. 298, 312

(1957), *overruled on other grounds, Burks v. United States*, 437 U.S. 1 (1978).[34]

Ms. Griffin relies on this language from *Yates*. However, the insupportable ground in that case was legal in nature rather than factual. As with Ms. Griffin, the defendant in *Yates* was charged with and convicted of a dual-objective conspiracy under 18 U.S.C. § 371. *Id.* at 300-01. However, the Supreme Court held that prosecution under one arm of the conspiracy was barred by the statute of limitations. The Court therefore concluded that, because the general verdict made it impossible to determine the basis of the jury's verdict, the judgment had to be set aside. *Id.* at 311-12. Thus, in *Yates* the theory supporting an object of the conspiracy was *legally* insufficient; here, the *evidence* fails to establish one object of the charge conspiracy.

Numerous courts have reversed general verdicts on the basis of *Yates* where one of the objects in a

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[34] The *Yates* decision relies on *Cramer v. United States*, 325 U.S. 1, 36 n.45 (1945) (general verdict must be set aside if any of the acts charged did not legally constitute treason); *Williams v. North Carolina*, 317 U.S. 287, 291-92 (1942) (judgment based on general verdict cannot stand where one ground upon which it might rest is constitutionally invalid); *Stromberg v. California*, 283 U.S. 359, 367-70 (1931) (conviction reversed where one objective was unconstitutional and general verdict made it impossible to identify on which objective the judgement rested). For post-*Yates* decisions *see, e.g., Bachellar v. Maryland*, 397 U.S. 564, 571 (1970); *Leary v. United States*, 395 U.S. 6, 30-32 (1969); *Street v. New York*, 394 U.S. 576, 585-88 (1969).

multi-object count is legally invalid.[35] Only a few courts, including this one, have examined specifically the issue of whether a conviction may be upheld where there is a failure of proof, rather than a legal insufficiency, with regard to one of the objects. In *United States v. Alvarez*, 860

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[35] *See, e.g., Feela v. Israel*, 727 F.2d 151, 155 (7th Cir. 1984) (conviction overturned where court could not determine if jury based its decision on erroneously introduced evidence, for "where a verdict is general, and conviction under one of several alternate theories would be unconstitutional, the conviction must be set aside lest the verdict rest on an unconstitutional basis"); *Cramer v. Fahner*, 683 F.2d 1376, 1379 (7th Cir.) (conspiracy conviction reversed where verdict could have been based illegally on overt acts which occurred after conspiracy ended; because court was "unable to tell whether the jury based its verdict on the valid or invalid counts, the general conspiracy conviction was unconstitutional"), *cert. denied*, 459 U.S. 1016 (1982); *United States v. Head*, 641 F.2d 174, 179 (4th Cir. 1981) (conviction based on general verdict reversed where basis of multi-object conspiracy charge rested on acts occurring outside statute of limitations and district court refused to instruct jury that it had to find an overt act committed within the applicable period); *United States v. Kavazanjian*, 623 F.2d 730, 739-40 (1st Cir. 1980) (general verdict multi-object conspiracy conviction under 18 U.S.C. § 371 reversed where one object failed to state a crime); *United States v. Carman*, 577 F.2d 556, 566-68 (9th Cir. 1978) (conviction based on general verdict reversed where single conspiracy count charged commission of multiple substantive acts and one substantive count was reversed for failure to state a crime); *United States v. Baranski*, 484 F.2d 556, 560-61 (7th Cir. 1973) (general verdict of guilty for multi-object conspiracy in violation of 18 U.S.C. § 371 reversed where one object found unconstitutional); *United States v. Driscoll*, 449 F.2d 894, 898 (1st Cir. 1971) (general verdict on multi-object conspiracy charge overturned where one object was legally insufficient), *cert. denied*, 405 U.S. 920 (1972).

F.2d 801, 815-18 (7th Cir. 1988), the court determined, based on *Yates* and *United States v. Holzer*, 840 F.2d 1343 (7th Cir. 1988),[36] that a CCE conviction could not stand because the evidence failed to show that the defendant had supervised two of the seven alleged subordinates and the jury did not indicate which five persons it found the defendant to have supervised. However, we subsequently granted rehearing and affirmed the conviction. *See United States v. Holguin*, 868 F.2d 201, 202-04 (7th Cir.), *cert. denied*, 110 S.Ct. 97 (1989). On rehearing, the government asserted that "*Yates* and *Holzer* do not apply to sufficiency of evidence claims such as those presented here," but rather only to cases where " 'a count in an indictment specifies more than one ground upon which a conviction on that count may be based, and one of those specific grounds is unconstitutional or otherwise legally deficient.' " *Id.* at 202 (quoting Government's Br.). We concluded that "there is merit to this submission." *Id.* at 203. Based on several Ninth Circuit cases that held "that *Yates* does not apply to insufficiency of evidence claims,"[37] a result with which the Seventh Circuit had

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[36] In *Holzer*, mail fraud convictions were reversed in light of *McNally v. United States*, 483 U.S. 350 (1987). Because the jury could have found that the mail fraud charges constituted the necessary predicate offenses to a racketeering count, that conviction was vacated as well. 840 F.2d at 1352.

[37] *See, e.g., United States v. Halbert*, 640 F.2d 1000, 1008 (9th Cir. 1981); *United States v. Phillips*, 606 F.2d 884, 886 n.1 (9th Cir. 1979), *cert. denied*, 444 U.S. 1024 (1980); *United States v. Jessee*, 605 F.2d 430, 431 (9th Cir. 1979); *United States v. Outpost Dev. Co.*, 552 F.2d 868, 869-70 (9th Cir.), *cert. denied*, 434 U.S. 965 (1977).

expressed general agreement,[38] the court determined that "these cases must control the outcome here." *Id.* Accordingly, because there was evidence that the defendant had supervised at least five individuals, the court affirmed the CCE conviction. *Id.* at 204.

Only months after *Holguin* was decided, this court heard *United States v. Bucey*, 876 F.2d 1297 (7th Cir.), *cert. denied*, 110 S.Ct. 565 (1989). In *Bucey*, the jury convicted the defendant, by general verdict, of conspiracy to defraud the government in violation of 18 U.S.C. § 371. The multi-object conspiracy count included, as here, both a tax and drug object. *Id.* at 1311 n.26. In analyzing the legal claim that none of the acts comprising the conspiracy constituted a criminal offense, the court acknowledged the "general tenet of conspiracy law that when an indictment alleges a conspiracy with multifarious objectives, a conviction will be sustained so long as the evidence is sufficient to show that the defendants agreed to

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[38] *See United States v. Soteras*, 770 F.2d 641, 646 (7th Cir. 1985) (dual-object conspiracy conviction under section 371 affirmed where sufficient evidence supported one object; court did not have to examine whether evidence supported the second object); *see also United States v. Alexander*, 748 F.2d 185, 189 (4th Cir. 1984) (court need not decide whether evidence supported second theory of count where sufficient evidence supported first theory and record indicated that jury relied on first theory), *cert. denied*, 472 U.S. 1027 (1985); *United States v. Alvarez*, 735 F.2d 461, 465-66 (11th Cir. 1984) (conviction will be affirmed for multi-objective conspiracy if the evidence supports at least one objective); *cf. United States v. Berardi*, 675 F.2d 894, 902 (7th Cir. 1982) (where jury receives "one is enough" charge that any of the multiple acts alleged in the count may support conviction, general verdict may be upheld only if sufficient evidence supports each act alleged).

accomplish at least one of the alleged objectives." *Id.* at 1312. The court affirmed the conspiracy conviction and explicitly recognized the distinction between legally and factually impermissible grounds of conviction:

> Because none of the objectives upon which the jury may have relied involves a legally invalid or unconstitutional basis for conviction, the general verdict form does not require reversal of [the defendant's] conspiracy conviction.

Id. at 1312 n.27. Thus, the court found that it was unnecessary to examine whether the evidence supported all of the objectives and examined instead only whether the evidence supported the tax objectives. *Id.* at 1312 n.28. Concluding that it did, the conviction was affirmed. *Id.* at 1313. *See United States v. Soteras*, 770 F.2d 641, 646 (7th Cir. 1985).

This court most recently examined the issue in *United States v. Sababu*, 891 F.2d 1308 (7th Cir. 1989), where the defendant claimed that his conviction may have been based on an illegal ground and that the general verdict should be vacated. The court rejected this claim because none of the grounds "were unconstitutional or legally deficient. Moreover, a conspiracy conviction will be [up]held as long as the evidence shows that the defendants agreed to commit at least one of the alleged objective of the conspiracy." *Id.* at 1326 n.6. Because the evidence showed that the defendants agreed to the alleged objectives, the court concluded that there was no basis for overturning the jury's general verdict. *Id.*

We note that the Second Circuit recently evaluated a claim similar to Ms. Griffin's and failed to make a distinction between factual and legal insufficiency. In *United*

States v. Garcia, No. 90-1088, slip op. at 3 (2d Cir. June 29, 1990), the defendants claimed that the evidence did not support their conviction under a dual-object conspiracy charge. The court concluded that a new trial was warranted because one of the two theories advanced by the government in support of the charge was not established by the evidence.[39] *Id.* We do not find this case persuasive.

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[39] The Third Circuit may agree with this holding. *See United States v. Dansker*, 537 F.2d 40, 51 (3d Cir. 1976) (general verdict for dual-objective conspiracy count reversed where evidence was insufficient to support conviction under one objective), *cert. denied*, 429 U.S. 1038 (1977). This case may be distinguishable, however, on the ground that the trial court gave, with respect to the *objective* of the conspiracy, a "one is enough" instruction. *See United State v. Holguin*, 868 F.2d 201, 203 n.5 (7th Cir. 1989). *But see United States v. Velasquez*, 885 F.2d 1076, 1090-91 (3d Cir. 1989) (conspiracy conviction reversed where no legal basis existed to support verdict because only named co-conspirator had been determined previously not to have joined conspiracy), *cert. denied*, 110 S.Ct. 1321 (1990).

The only other court that has indicated in any way that it might agree with the Second Circuit on this issue is the First Circuit, although its position is unclear. The First Circuit has not addressed directly whether there is a distinction between factual and legal insufficiencies, but it has relied on *United States v. Natelli*, 527 F.2d 311, 325 (2d Cir. 1975), *cert. denied*, 425 U.S. 934 (1976), the one case supporting the view taken in *Garcia, see infra* note 40. However, the insufficiencies in these cases were legal rather than factual. *See, e.g., United States v. Kavazanjian*, 623 F.2d 730, 740 (1st Cir. 1980) (citing *Natelli*, court reversed general verdict multi-object conspiracy conviction under 18 U.S.C. § 371 where one object failed to state a crime); *United States v. Moynagh*, 566 F.2d 799, 804 (1st Cir. 1977) (relying on *Natelli*, general verdict reversed where defendants' conduct could not constitute a crime), *cert. denied*, 435

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First, the Garcia panel did not recognize any Supreme Court precedent or address the factual/legal distinction issue, but relied solely on two of its prior decisions.[40] Second, one of those prior Second Circuit cases specifically identified the legal/factual distinction and found it [sic] outcome determinative. In *United States v. Ruggiero*, 726 F.2d 913 (2d Cir.), *cert. denied*, 469 U.S. 831 (1984), the Second Circuit reversed a RICO conviction where a "*legally insufficient* predicate act . . . may have been necessary to the verdict." *Id.* at 921 (emphasis supplied). Moreover, the *Ruggiero* court distinguished *United States v. Natelli*, 527 F.2d 311, 325 (2d Cir. 1975), *cert. denied*, 425 U.S. 934 (1976), the other case relied upon in *Garcia*, on the ground that *Natelli* addressed whether the evidence was sufficient to support one of several acts alleged within the charge rather than the legal sufficiency of the charge itself. *Id.*, at 922. Finally, other precedent from within the Second Circuit does not support what appears to be the anomalous result in *Garcia*.[41]

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U.S. 917 (1978); *cf. United States v. Driscoll*, 449 F.2d 894, 898 (1st Cir. 1971) (general verdict on multi-object conspiracy charge reversed because one object legally insufficient), *cert. denied*, 405 U.S. 920 (1972).

[40] *See United States v. Ruggiero*, 726 F.2d 913, 921-22 (2d Cir.) (RICO conviction reversed where legally insufficient predicate act may have been necessary to verdict), *cert. denied*, 469 U.S. 831 (1984); *Natelli*, 527 F.2d at 325 (court relied on "the general principle" of *Yates* and found that general verdict was ambiguous and therefore reversible where one object in multi-object count was unsupported by the evidence; court did not identify that *Yates* related to legal insufficiency).

[41] *See United States v. Rastelli*, 870 F.2d 822, 830-31 (2d Cir.) (conviction upheld where one object was *legally insufficient*, but

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Accordingly, we rely on precedent from this circuit that draws the distinction between legal and factually unsupported objects in multi-object conspiracy cases. Based on an application of the principles discussed in these decisions, we must affirm the jury's verdict. As discussed above, the evidence supports Ms. Griffin's conviction under the tax objective. Thus, there is no basis for overturning the jury's general verdict. *See Turner*, 396 U.S. at 420; *Sababu*, 891 F.2d at 1326 n.6; *Bucey*, 876 F.2d at 1312; *Holguin*, 868 F.2d at 202-04.

Finally, we do not understand why, once the government admitted it could not link Ms. Griffin to the DEA objective of the conspiracy count, the district court failed to grant a partial judgment of acquittal with respect to that count. Nevertheless, we do not believe that this failure resulted in substantial prejudice. In instructing the jury, the district court specifically referred to the conspiracy charged in count twenty as "the tax conspiracy." Tr. at 3624. Moreover, in acknowledging a misstatement made in closing argument, the Assistant United States Attorney

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instructions made it clear that jury also found second object, which was legally and factually sufficient; had it not been clear, reversal would have been required under *Ruggiero*), *cert. denied*, 110 S.Ct. 515 (1989); *United States v. Southland Corp.*, 760 F.2d 1366, 1378 (2d Cir.) (dual-object conspiracy conviction upheld where evidence was sufficient under one object but may have been insufficient under second object), *cert. denied*, 474 U.S. 825 (1985); *United States v. Papadakis*, 510 F.2d 287, 297-98 (2d Cir.) (multi-object conspiracy conviction upheld where one object was not supported by evidence but other object was), *cert. denied*, 421 U.S. 950 (1975).

specifically noted that the government did not contend that Ms. Griffin had conspired to defraud the DEA.

Conclusion

For the foregoing reasons, we affirm the convictions and sentences of each defendant.

AFFIRMED

Supreme Court of the United States

No. 90-6352

Diane Griffin,

Petitioner

v.

United States

ON PETITION FOR WRIT OF CERTIORARI to the United States Court of Appeals for the Seventh Circuit.

ON CONSIDERATION of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted.

February 19, 1991

No. 90-6352

In The

Supreme Court of the United States

October Term, 1990

DIANE GRIFFIN,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF FOR THE PETITIONER

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QUESTIONS PRESENTED FOR REVIEW

(1) Whether The General Jury Verdict Of Guilty Against A Single Defendant Is Reversible Under A Dual Object Conspiracy Count In A Multi-Defendant Drug Prosecution Where A General Verdict Renders It Impossible To Say Whether The Defendant Was Convicted By The Jury Based On The Object Insupportable As A Matter Of Law Or On The Remaining "Supportable" Object.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit affirming petitioner's conviction and sentence is reported at 913 F. 2d 337 (7th Cir. 1990) and is reproduced in the Joint Appendix at pages 54 to 118. The Memorandum Opinion and Order of the United States District Court for the Northern District of Illinois, Eastern Division issued October 28, 1988, is reproduced in the Joint Appendix at pages 47 to 53.

JURISDICTION

The judgment of the United States Court of Appeals for the Seventh Circuit affirming the U.S. District Court was entered on September 7, 1990. The petition for a writ of certiorari was filed timely on November 27, 1990 and this Court granted Certiorari on February 19, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES INVOLVED

The Defendant was convicted of violation of 18 U.S.C. Section 371. No issues are raised involving the statute itself.

CONSTITUTIONAL PROVISIONS

This case concerns the constitutionally secured right to due process of law under Amend. V, and the constitutionally secured right to a jury trial under Amend. VI.

Amend. V (1791).

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amend. VI (1791).

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of their State and District wherein the crime shall have been committed, which District shall have been previously ascertained by a law, and to be informed of the nature and cause of the accusation; to be confronted by the Witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the assistance of Counsel for his defense.

STATEMENT OF THE CASE

This is a criminal case. Defendant, Diane Griffin, was charged in one Count, Count 20, of a 23 Count indictment with conspiracy to defraud the United States by two objects under 18 U.S.C. Section 371. The first object was

to impede, impair, obstruct and defeat the lawful functions of the Department of the Treasury, in particular the Internal Revenue Service, in the ascertainment, computation, assessment and collection of the revenue: to wit, income taxes. The second object was to impede, impair, obstruct and defeat the lawful functions of the Department of Justice, in particular the Drug Enforcement Administration, in the ascertainment of forfeitable assets.

At the end of the government's case and at the end of the entire case, the government and the trial judge agreed that there was not sufficient evidence in the case that Griffin had knowledge of drug dealing activities by the co-defendants or any person. The trial court refused to modify the jury instructions submitted by the government so that the jury would only consider the Internal Revenue Service object of the dual object conspiracy charge or require the jury to specify of which one of the two objects the jury found that defendant Griffin had knowledge.

The jury found defendant guilty of the conspiracy in Count 20, but it is unknown whether the jury found that Griffin had knowledge of the Drug Enforcement Administration object or the Internal Revenue Service object. She moved for a new trial on the basis that error was made in failing to remove the D.E.A. object as a basis for conviction through use of proper jury instructions. That motion was denied. The trial court sentenced the defendant to five years probation on the condition that she complete six months of work release and five hundred hours of community service. It is from this conviction, sentence and the affirmance of the United States Court of Appeals for the Seventh Circuit that the defendant seeks

reversal. The Seventh Circuit found that where the one object in a multi-object conspiracy was unsupported by the evidence as opposed to being legally insufficient, the guilty verdict is valid as long as there is sufficient evidence on the other object even if it is not known which object of the conspiracy the jury found as the predicate for the conviction.

The Seventh Circuit found that when there is a dual object conspiracy count where the one object is not factually supportable but the other object is factually supportable and the jury returns a general verdict not specifying upon which ground or upon which object the jury found guilt, the conviction must not be set aside even if it is impossible to tell which object the jury selected; however, if the factually unsupported object had been instead a legally insufficient object, then the conviction must be set aside since it is impossible to tell whether the jury selected the legally insufficient object.

SUMMARY OF ARGUMENT

Diane Griffin was charged with one count in a multi-defendant, multi-count indictment of a major drug prosecution in the United States District Court for the Northern District of Illinois, Eastern Division. Diane Griffin was charged in that one count under 18 U.S.C. Section 371 with a conspiracy having two objects, i.e. to defraud the United States by impeding the Internal Revenue Service in the ascertainment of income taxes and to defraud the United States by impeding the Drug Enforcement Administration in the ascertainment of forfeitable assets.

With regard to the conspiracy to defraud the Drug Enforcement Administration, the government produced a substantial amount of evidence of Griffin's association with major drug dealers and her cohabitation with the alleged kingpin of the drug operation, Alex Beverly. With regard to the conspiracy to defraud the United States by impeding the Internal Revenue Service in the ascertainment of income taxes, the government produced in evidence that Beverly gave Griffin real and personal property that she placed in her name and reported as hers on her income tax returns.

The government admitted at the time of Griffin's Motion For Judgment Of Acquittal at the end of the government's case that the evidence produced insufficiently supported the conspiracy to defraud the United States by impeding the Drug Enforcement Administration in the ascertainment of forfeitable assets. The trial court accepted the government's admission that the evidence was insufficient to support the Drug Enforcement Administration object. The trial court denied Griffin's Motion For Severance. At the end of the case, the trial court denied Griffin's tendered, alternative instructions that would have either required the jury to specify the objects of the conspiracy upon which the jury was finding guilt, if any, or would have restricted the jury to consider only the remaining Internal Revenue Service object of the conspiracy. On the contrary, over Griffin's objection the trial court gave the two government instructions that presented the two objects of the conspiracy count in the alternative. The government's instructions allowed the

jury to choose either the Drug Enforcement Administration object or the Internal Revenue Service object to convict Griffin on the conspiracy count.

The jury returned a general verdict of guilty on the conspiracy count. But it is not known, and it shall never be known, if the jury found her guilty of conspiracy based on the Drug Enforcement Administration object alone.

The reasoning in *Yates v. United States*, 354 U.S. 298 (1957) and *Stromberg v. California*, 283 U.S. 359 (1931) prohibits general verdicts on multiple object conspiracies where the verdict is supportable on one ground, but not on another, and it is impossible to tell which ground the jury selected. The United States Court of Appeals for the Seventh Circuit affirmed the conviction of Griffin on the ground that the rule of *Yates* and *Stromberg* applies when one of the objects is insufficient as a matter of law but that the rule of *Yates* and *Stromberg* does not apply when one of the objects is insufficiently supported by the evidence. In essence, the Seventh Circuit stated that when an object is insufficiently supported by the evidence, it is not a matter of law. This position, however, is contrary to the well accepted proposition that when the evidence fails to meet a minimum standard of proof, the failure is a matter of law. The judge rules as a matter of law that the proof has failed and that the defendant shall not be convicted. *Galloway v. United States*, 319 U.S. 372 (1943). Moreover, a challenge to the sufficiency of the evidence supporting a conviction is a constitutional claim. *Jackson v. Virginia*, 443 U.S. 307 (1979); *In Re Winship*, 397 U.S. 358 (1970).

It seems certain that if the statute of limitations in the Drug Enforcement Administration object had run or if the Drug Enforcement Administration object had been unconstitutional or if the Drug Enforcement Administration object of the conspiracy count had failed to state an offense, the Seventh Circuit would have reversed based on the rule of *Yates* and *Stromberg*. However, because the Drug Enforcement Administration object of the conspiracy was insufficiently supported by the evidence, the Seventh Circuit refused to follow the *Yates* and *Stromberg* rule.

The Seventh Circuit has found it improper to have the possibility that a defendant be convicted on an object where constitutional law says that object is unconstitutional. The Seventh Circuit has found it improper to have the possibility that a defendant be convicted on an object where the law regarding the statute of limitations precludes conviction on the object. The Seventh Circuit has found it improper to have the possibility that a defendant be convicted on an object that does not state an offense. However, the Seventh Circuit has found it proper to have the possibility that the defendant be convicted where the law with regard to the sufficiency of the evidence says that defendant cannot be convicted. The difference that the Seventh Circuit has drawn between legally insufficient objects and objects insufficiently supported by evidence is the quintessential difference without a distinction.

Petitioner urges this Court to preserve the rule of *Yates* and *Stromberg* which requires that a general verdict on multi-object count be set aside in cases where a general verdict is supportable on one object, but not on

another, and it is impossible to tell which object the jury selected. Further, petitioner urges the Court to find that for these purposes there is no distinction between objects deemed unconstitutional, objects precluded by the statute of limitations, objects insufficient by their allegations to state an offense and objects insufficiently supported by the evidence. Petitioner urges this Court to reverse the judgment and to remand the cause for new trial.

ARGUMENT

(A). GRIFFIN WAS CHARGED IN A DUAL OBJECT CONSPIRACY WHERE ONE OF THE OBJECTS WAS INSUFFICIENTLY SUPPORTED BY EVIDENCE

Defendant Diane Griffin was charged in one Count, Count 20, of a 23 Count Indictment under 18 United States Code Section 371 with conspiracy to defraud the United States by impeding the Internal Revenue Service in the ascertainment of income taxes and secondly by impeding the Drug Enforcement Administration in the ascertainment of forfeitable assets. (J.A. 17-22) She was indicted with five defendants and required to be on trial with four of them. The overwhelming majority of the case and the most significant part of this multiple count, multiple defendant cause consisted of evidence of drug dealing. (R. 340 Tr. 169-672, 688-1114) The tax evasion issue was a relatively small one at the trial. The government indicted Griffin under a theory that she had knowledge of drug dealing, and the government attempted to prove up their allegation.

Every one of the other five co-defendants at trial in the case were charged in the indictment with substantive counts of drug dealing. The government brought in evidence to connect Griffin to the other defendants. The government emphasized the fact through its evidence that she was one of the girl friends of the alleged drug kingpin, Alex Beverly. (R. 340 Tr. 427, 428, 749, 751, 845, 2964, 2965, 2966) During this five to six week trial the government repeatedly brought in evidence that drug conversations were had in her bar and on her telephones both in the bar and in her apartment. During the long trial the government repeatedly brought out through evidence that numerous large drug deals were initiated in her bar and then consummated in her building next door to her bar. The government brought in evidence that she had conversations with the largest wholesale supplier of drugs in the case and took messages from him for Beverly. (R. 340 Tr. 736, 737, 779, 781, 810, 811, 820, 823, 838, 841, 842, 855. Also generally Tr. 688-1114)

The government lead the evidence up to the point where Griffin was going to be a party to drug conversations, and the government had every intention of presenting evidence that she was a party. In the government's proffer it states where the evidence was going to demonstrate that Griffin was party to a drug conversation. On page 12 of the proffer it states as follows:

> On July 25, 1986, Johnnie Davis met with Willie Jordan at the new Somon's Lounge. At the bar, Davis had a conversation with Jordan and Diane Griffin, one of Beverly's girl friends. (Sic) Davis told Jordan that he wanted to talk business, and Jordan told him that he was currently out of brown, referring to brown heroin. Jordan

> further told Davis that he was expecting a load of brown in the next few days. Jordan told Davis that he would do a deal with him as soon as the brown came in. Jordan further told Davis that he was 'up to his ass in white', referring to cocaine. (R. 180 p. 12)

However, the witness' testimony at trial failed to place Griffin in the conversation as the government had promised it would do. In the testimony before the jury Davis testified that he and Jordan moved down to the other end of the bar while he conversed with Jordan. No one else was a party to their conversation. (R. 340 Tr. 300) Despite adducing a substantial amount of testimonial evidence and introducing a substantial amount of physical evidence that Griffin personally knew the defendants who were dealing in drugs and evidence that the defendants and co-defendants frequented her lounge, met her on many days and, in fact, that one, Beverly, actually lived with her in her apartment, it was undeniable that the government's evidence both at the end of its case and at the end of the trial as a whole was insufficient as a matter of law to show that Griffin had knowledge of any drug dealing. (R. 340 Tr. 2615)

(B). THE GOVERNMENT ADMITTED THAT THE EVIDENCE WAS INSUFFICIENT.

The government admitted at defendant's Motion For Judgment Of Acquittal at the end of the government's case that the evidence was insufficient as a matter of law that defendant had knowledge of the Drug Enforcement Administration object of the conspiracy. (R. 340 Tr. 2615) Consequently, the jury could not reasonably find

that Griffin had knowledge of that particular object of the conspiracy. The trial court agreed that the evidence was insufficient for a jury to convict Griffin based on the D.E.A. object. (J.A. 52)

Despite the fact that the trial court agreed after the government conceded the point that the evidence was insufficient to show knowledge of drug dealing, there was no indication that the jury realized what the lawyers and judge knew and/or agreed was a fact. The trial court denied Griffin's Motion For Severance after the government admitted that the record contained no evidence that Griffin had any knowledge of drug dealing. (R. 340 Tr. 3040, 3041)

This would have been an appropriate motion to grant since there was overwhelming prejudice caused to Griffin by requiring her to continue with the trial of the conspiracy to defraud the Internal Revenue Service with defendants charged with substantial drug distribution charges and against whom the government brought substantial evidence of drug distribution. There was a substantial possibility that the jury would unreasonably conclude that Griffin had knowledge of drug dealings because, as the Memorandum Opinion and Order of the District Court states, "Finally, Griffin has had a long standing intimate personal relationship with Beverly." (J.A. 51)

The only true alternative to a severance was to advise the jury affirmatively through a proper jury instruction that the jury could not consider the D.E.A. object of the conspiracy when it came to Ms. Griffin. The goal should have been to allow the jury only to deliberate on the I.R.S. object of the conspiracy. In lieu of that the use of a special

interrogatory to the jury to ask what object the jury was finding would have precluded the jury from finding Ms. Griffin guilty on the D.E.A. object.

(C). THE TRIAL COURT REFUSED DEFENDANT'S INSTRUCTIONS.

The trial court refused to give Defendant Griffin's Instruction 4A or 5A. (J.A. 39, 41) Not only did the trial court refuse to grant the severance, the court over defendant's objection accepted Government's Instructions Number 20 and 21. (R. 340 Tr. 3254 J.A. 31, 32) These instructions allowed the jury to find the defendant guilty under an erroneous view of the law because the instruction contained an erroneous statement of the law. The Government's Instruction Number 20 stated: "In Count 20 of the indictment, defendants Alex Beverly, Betty McNulty and Diane Griffin are charged with conspiracy to impede the lawful functions of the Internal Revenue Service and the Drug Enforcement Administration: Title 18 U.S.C. 371 provides in pertinent part:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be guilty of crime"

This instruction contains the disjunctive language *the United States, or any agency thereof.* The jury knew that the D.E.A. was a separate agency from the I.R.S. Under this

erroneous advisement, the jury only had to find a conspiracy against any one agency of the United States, i.e. either the D.E.A. or the I.R.S.

Government Instruction Number 21 stated: "The government must prove beyond a reasonable doubt, from the defendant's own acts and statements, that he or she was aware of the common purpose and was a willing participant." These instructions together allowed the jury to believe that there were two common purposes available for their consideration in finding the defendant Griffin guilty, i.e. to impede the I.R.S. and to impede the D.E.A., either of which was sufficient to convict.

These two instructions allowed the jury to have the erroneous view of the law that it was possible for them to find that Diane Griffin was aware of the common purpose of the conspiracy to impede the lawful functions of the Drug Enforcement Administration where, in fact, it was legal error for the jury to find that she had knowledge of the D.E.A. objective. These two instructions allowed the jury to believe that a conspiracy against either of the two agencies was sufficient to convict. The D.E.A. is "any agency" of the United States. This was the equivalent of the "one is enough rule" that many Circuits, including the Seventh Circuit, have said requires a specification of which object the jury is finding.[1] The trial court allowed

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[1] The Seventh Circuit ventured that where a trial court instructs a jury that if the jury finds defendant guilty of only one of the objects in a multiple object conspiracy the jury may convict on the count and where one of the objects was insufficiently supported by evidence, the conviction may be reversible. *United States v. Beverly,* 913 F. 2d 337, 364 & n. 39 (7th Cir. 1990).

the jury to take an erroneous view of the law. The trial court did not do anything to eliminate the possibility that the jury would take an erroneous view of the law.

The indictment went back with the jury when the indictment allowed the jury to consider either of the two objects at the time that the jury decided whether or not to find the defendant Griffin guilty.

In order to attempt to preclude the possibility that the jury would find Griffin guilty based on her having knowledge of the drug dealings surrounding her, i.e. the D.E.A. object of the dual objective conspiracy charge, Griffin objected to Government Instruction Number 21 because it did not differentiate between the two objects of the conspiracy nor did it eliminate the D.E.A. object of the conspiracy from the jury's consideration or possible finding.

In lieu of the misleading Government's Instruction Number 21, defendant submitted Defendant Griffin's Instruction Number 1A in combination with Defendant Griffin's Special Interrogatory Number 1 and Defendant Griffin's Special Interrogatory Number 2. (J.A. 34, 35, 36, 37, 38) Defendant Griffin's Instruction Number 1A would have required the finder of fact, the jury, to find what is necessary, i.e. that defendant had knowledge of one of the objects of the conspiracy. Defendant Griffin's Special Interrogatory Number 1 and Defendant Griffin's Special Interrogatory Number 2 would have permitted the jury to specify which object of the conspiracy the jury was finding that Diane Griffin had knowledge of, if either. (R. 340 Tr. 3155, 3156)

The government objected to the special interrogatories 1 and 2. The stated reason for the government's objection to the interrogatories was " . . . in order to find the defendant guilty they have to find the elements. There's no basis for the special interrogatories and we object." The second stated objection was as follows, "Judge, I don't think it's necessary to submit it up, and I don't think it's any basis for the special interrogatory. The charge is clear what they have to find. The elements are clear. To divide it up by saying choose, I don't think it's appropriate and I don't think it's necessary." (R. 340 Tr. 3145 and 3146)

The Court refused to give Defendant Griffin's Instruction Number 1A and/or Defendant Griffin's Special Interrogatory Number 1 or Defendant Griffin's Special Interrogatory Number 2.

Knowledge of the object of the conspiracy is an essential element of any conspiracy conviction. *Ingram v. United States*, 360 U.S. 672 (1959). Without the knowledge intent cannot exist. *Direct Sales Co. v. United States*, 319 U.S. 703 (1943). It is fundamental that a conviction for conspiracy under 18 U.S.C., Section 371, cannot be sustained unless there is proof of an agreement to commit an offense against the United States. *Pereira v. United States*, 347 U.S. 1, 12 (1954).

In shorthand terms the objects were the D.E.A. object and the I.R.S. object. The government agreed that there was no evidence that defendant had knowledge of the D.E.A. object of the conspiracy. It follows then that the jury had specifically to find that defendant Griffin had knowledge of the I.R.S. object; yet, the Government

Instruction Number 21 did not differentiate between the two objects of the conspiracy; rather, it tendered the D.E.A. object of the conspiracy to the jury for finding. The trial court ruled that knowledge of the object of the unlawful purpose of the conspiracy was not an element of the offense. (R. 340 Tr. 3254)

As an alternative to Defendant's Instruction Number 1A with Defendant Griffin's Special Interrogatories Number 1 and Number 2, the defendant submitted Defendant Griffin's Instruction Number 4A so that the jury would have been required to find as an element of the offense, as required by case law, that the defendant knew that the object of the conspiracy was to defraud the Department of Treasury, in particular the Internal Revenue Service. (J.A. 39) This was the only possible remaining object of the conspiracy that the jury could have found under the evidence in the case and under the government's prior concession that there was insufficient evidence in the case that defendant had knowledge of the object of the conspiracy to defraud the D.E.A.

As an alternative to Defendant Griffin's Instruction Number 4A, the defendant submitted Defendant Griffin's Instruction Number 5A which required that the finder of facts, the jury, find that the government proved beyond a reasonable doubt that the defendant was aware that the common purpose of the conspiracy was to defraud the United States by impeding, impairing, obstructing and defeating the lawful functions of the Department of Treasury, in particular the Internal Revenue Service. (J.A. 41 R. 340 Tr. 3155, 3156) This instruction would have eliminated the possibility that the jury unreasonably and unlawfully found the other object of the conspiracy, i.e.

the D.E.A. object. If the jury found defendant guilty on the basis of the D.E.A. object, the jury found her guilty based on an erroneous view of the law since there was insufficient evidence as a matter of law to find her guilty based on knowledge of the D.E.A. object.

(D). THE GOVERNMENT ARGUED THE D.E.A. OBJECT IN CLOSING.

Despite the government concession that the D.E.A. object was insufficiently proved, when the government gave closing argument, the government advised the jury that Count 20 was a conspiracy to hide assets from the D.E.A. and the I.R.S. In particular the prosecutor said:

> "There are, first of all, two conspiracy counts. Count 1 is a drug conspiracy, and it names the defendants Beverly, Brown, McNulty and McCorkle in a drug conspiracy. Count 20 is also a conspiracy, but that's a conspiracy to hide assets from the D.E.A. and the I.R.S. and again the defendant Beverly is named in that conspiracy count along with his girlfriends, Betty McNulty and Diane Griffin. In addition to those two conspiracy counts there are eighteen specific drug counts, those counts charge various defendants with the drug transactions that you heard about, the drug transactions that they participated in." (R. 340 Tr. 3295-3296)

In fact, in Count 20 the first seventeen paragraphs of Count 1, the drug conspiracy, are incorporated into Count 20 as are paragraphs 1 and 2 of Count 23, the drug based Continuing Criminal Enterprise Count. (J.A. 2-7, 17, 25 and 26)

When the government gave closing argument with regard to Count 20 specifically, the government did not differentiate between the knowledge of Griffin and the knowledge of Beverly and McNulty. Counsel for defendant Griffin objected to the argument but it was overruled. The government told the jury:

> "Now, Count 20 is the second conspiracy. Count 20 doesn't allege a drug conspiracy. It alleges a conspiracy to evade the I.R.S. and to evade the D.E.A. Conspiracy to impede the lawful functions of those agencies. As to this count the government must show that the alleged conspiracy existed; that the defendants Beverly, McNulty and Griffin knowingly and intentionally became members of the conspiracy, and that an overt act was committed in furtherance of the conspiracy. Count 20 charges that those –
>
> Mr. Logan: Judge, I have an objection for the record, as to what it must show. I object to that.
>
> The Court: Alright. Overruled." (R. 340 Tr. 3353, 3354)

Even after all the discussion and eventual agreement that Ms. Griffin had no knowledge of drug trafficking, the government in rebuttal argument still attempted to argue to the jury that Ms. Griffin saw that members of Beverly's organization were dealing cocaine. The prosecutor in argument made direct reference to the previously referred to proffered factual situation in which the pretrial proffer indicated that Diane Griffin was privy to a drug conversation even though the testimonial evidence later disclosed that she was not privy to it. The prosecutor argued to the jury:

> Peter Suarez was a cocaine dealer. And you know that Mr. Beverly and the members of his organization were dealing cocaine. How do you know that? Because what was it that Diane Griffin saw? How do you know that? – Because remember when Jim Dandy said to – in '86 when Mr. Suarez was making deliveries to Mr. Beverly? Remember what Jim Dandy said to Officer Milton when Officer Milton was trying to buy heroin? Jim Dandy said, "I don't have any heroin but I have plenty of white." (R. 340 Tr. 3554)

Counsel for Griffin objected to the government's rhetorical question. (R. 340 Tr. 3571) The question implied that Ms. Griffin saw drug trafficking. This was exactly the reason that the proper jury instructions were required. Defense counsel demanded that the jury be told that there was no evidence. Although the government assured the Court that it would cover it, the government only said that Griffin saw no cocaine.

> I misspoke earlier with respect to Diane Griffin, and that is that I said that there is evidence that she saw cocaine, and there's none. And we're not arguing that. Diane Griffin is charged in this case with assisting, knowingly assisting Alex Beverly in hiding his assets from the Internal Revenue Service. It's that simple. And we believe that the evidence has shown that that's what she did. (R. 340 Tr. 3571)

The evidence in the case showed that the Beverly organization was dealing both heroin and cocaine. This statement did not eliminate the heroin aspect. It did not eliminate the possibility that the jury would find that Griffin had knowledge of Beverly's drug dealing. Proper jury instructions were required.

The prosecutor's statement did not override the fact that Griffin prejudicially remained charged in the unredacted indictment with both objects of the conspiracy, that the government evidence showed that Ms. Griffin knew all the major drug players in the case and in fact lived with the kingpin, that the government in closing argument told the jury that she was charged with both objects of the conspiracy, that the jury instructions did not eliminate the very real possibility that the jury would only deliberate upon and find with regard to the D.E.A. object of the conspiracy and that trial court refused to advise the jury that the jury must find as an element of the case that defendant Griffin had knowledge of the D.E.A. object of the conspiracy. The instructions in this case do not make it clear that the jury found on the I.R.S. object of the conspiracy.

(E). THE JURY RETURNED A GENERAL VERDICT.

The jury in the instant case found defendant guilty of the conspiracy count. But it is not known, and it shall never be known, if the jury found her guilty because they found she knew of both objects of the conspiracy or the Internal Revenue Service object alone, or whether the jury found defendant guilty because they unreasonably and impermissibly found that she had knowledge of the D.E.A. object alone. It is not known whether the jury even considered the Internal Revenue Service object. Fact questions or special verdicts have been recognized as a tool to minimize the risk of jury prejudice or bias against a defendant.

The special verdict is available in federal criminal cases. Special verdicts are regularly used in criminal cases where the jury must determine the amount of interest to identify for the property subject to forfeiture. Notes of Advisory Committee on Rules, *Fed. R. Crim.* P. 31(e). In a discussion of the RICO statute one commentator has advocated use of special verdicts above and beyond the requirements of Rule 31(e) of the Federal Rules of Criminal Procedure.[2]

In *United States v. Coonan,* 839 F. 2d 886, 889-91 (2d Cir. 1988) the trial court was concerned about the possibility of prejudicial spill over from certain defendants to others. The court believed that if jurors were allowed to deliberate on a general verdict, the prejudice would be difficult if not impossible to detect or control. The judge proposed a two tier set of special questions that would first require the jury to determine whether the government had proven the existence of a RICO enterprise and secondly to determine with respect to each individual defendant whether the government had established that defendant's membership in the enterprise. Lastly, the court would inquire of the jury whether each individual

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[2] Ciupak, *RICO and The Predicate Offenses: An Analysis of Double Jeopardy and Verdict Consistency Problems,* 58 Notre Dame Law Review 382, 408 (1982). Ciupak recommends that the jury should be asked to return with its general verdict a special verdict indicating which counts comprised the pattern of racketeering activity. She notes that several courts have successfully used this approach, including *United States v. Rone,* 598 F. 2d 564 (9th Cir. 1979); *United States v. Huber,* 603 F. 2d 387 (2d Cir. 1979) and *United States v. Peacock,* 654 F. 2d 339 (5th Cir. 1981).

defendant committed specific acts related to the conspiracy.

A general jury verdict of guilty may leave a reviewing court uncertain as to which offense or offenses alleged in a multi-object conspiracy were actually found by a jury. Where a general verdict renders it impossible to say whether a defendant was convicted under an erroneous or valid view of the law, the verdict is reversible.

(F). PRIOR SUPREME COURT LAW ON GENERAL VERDICTS.

In *Yates v. United States*, 354 U.S. 298 (1957) several defendants were convicted under the Smith Act of conspiracy (1) to advocate violent over throw of the government, and (2) to organize a society for the purpose of such advocacy. Finding the prosecution of the "organizing" object of the conspiracy was barred by limitations, the Supreme Court applied this rationale in reversing the conviction:

> 'We' have no way of knowing whether the overt act found by the jury was one which is believed to be in furtherance of the 'advocacy' rather than the 'organizing' objective of the alleged conspiracy . . . in these circumstances we think the proper rule to be applied is that which requires a verdict being set aside in cases where the verdict is supportable on one ground, but not on another, and it is impossible to tell which ground the jury selected. *Yates*, at 312.

In the instant case the "D.E.A." object of the alleged conspiracy was insupportable because of insufficient evidence as a matter of law. Both the government and the

trial court took the view that the "D.E.A." object was insupportable. (R. 340 Tr. 2615)

In *Yates* the organizing object of the conspiracy was found precluded by the statue of limitations only on appeal. The government contended that since the conspiracy charged embraced both "advocacy" of violent overthrow and "organizing" the Communist Party, and the jury was instructed that in order to convict it must find a conspiracy extending to both objects, there was harmless error there. The government's argument was that the jury must have found the defendant guilty of both objects and that since the advocacy of violent overthrow object was legally sufficient the conviction should stand. The Supreme Court responded:

> The portions of the trial court's instructions relied on by the Government are not sufficiently clear or specific to warrant our drawing the inference that the jury understood it must find an agreement if any to both 'advocacy' and 'organizing' in order to convict. Further, in order to convict, the jury was required, as the court charged, to find an overt act which was 'knowingly done in furtherance of an object or purpose of the conspiracy charged in the indictment,' and we have no way of knowing whether the overt act found by the jury was one which it believed to be in furtherance of the 'advocacy' rather than the 'organizing' objective of the alleged conspiracy. The character of most of the overt acts alleged associates them as readily with 'organizing' as with 'advocacy.' *Yates*, at 311 and 312.

The Supreme Court noted that the trial court did no more with regard to instructing the jury on the charge than to charge the jury, in the language of the indictment

"that the conspiracy had two objects, namely, to advocate and teach forcible over throw and to organize a Communist Party as a vehicle for that purpose, and then instruct the jury that it must find that the 'conspiracy charged in the indictment' had been proved beyond a reasonable doubt." Obviously the Supreme Court was not satisfied that the jury would understand that it had to find both objects before it convicted the defendant. In the instant case Government Instructions 20 and 21 presented the objects, i.e. to impede the I.R.S. and to impede the D.E.A. in the disjunctive. The jury only needed to find one object for conviction. This case ought to be reversed as the United States Supreme Court reversed in *Yates*.

The Supreme Court found the rationale for *Yates* in *Stromberg v. California*, 283 U.S. 359 (1931). In *Stromberg* the jury returned a general verdict of guilty on a count which contained three clauses defining the crime. The jury was instructed that proof of any one of the three defined acts would be sufficient to convict. The Supreme Court declared:

> It is impossible to say under which clause of the statute the conviction was obtained. If any one of these clauses . . . was invalid, it cannot be determined upon this record that the appellant was not convicted under that clause . . . (t)he necessary conclusion from the manner in which the case was sent to the jury is that, if any of the clauses in question is invalid under the Federal Constitution, the conviction cannot be upheld. *Stromberg*, 283 U.S. at 368.

Government Instructions 20 and 21 allowed the jury to deliberate upon and find Ms. Griffin guilty of Count 20 based upon the D.E.A. object alone. The government and

the trial court agreed, and both knew prior to the jury being instructed that the D.E.A. object was invalid as a matter of law. It cannot be determined upon the record in this case that the defendant was not convicted under the invalid D.E.A. object. It is impossible to say under which object of the conspiracy allegation the conviction was obtained. Just as the United States Supreme Court could not uphold the conviction in *Stromberg*, the conviction of the defendant in the instant case cannot be upheld.

In *American Medical Association v. United States*, 317 U.S. 519, 531-33 (1943) the Court held that a general verdict of guilty may stand only if the indictment alleges a single conspiracy and the evidence establishes a single conspiracy; conversely, if there are multiple objects of a conspiracy, and the evidence is insufficient as to any one of those objects, then a general verdict may not stand. The evidence with respect to Ms. Griffin on the D.E.A. object was admittedly insufficient, the jury's general verdict should not be allowed to stand. In *Haupt v. United States*, 330 U.S. 631, 641 & n.1 (1947) the Court held that where several acts are pleaded in a single count, a guilty verdict may not stand if any one of the pleaded acts was "insufficiently proved". This reasoning admits of only one disposition of Ms. Griffin's case and that is reversal and remand.

In *Zant v. Stephens*, 462 U.S. 862, 881 (1983) the Supreme Court held "that a general verdict must be set aside if the jury was instructed that it could rely on any two or more independent grounds, and one of those grounds is insufficient, because the verdict may have also rested exclusively on the insufficient ground." The trial

court in the instant case presented the two objects to the jury in the disjunctive; consequently the general verdict must be set aside.

(G). THE OPINION OF THE DISTRICT COURT.

The trial court in its Memorandum Opinion and Order on this issue would not have contested the applicability of *Yates v. United States, Stromberg v. California* or *United States v. Head* if, in the court's determination, the trial court's instruction had contained an erroneous view or statement of the law. The trial court merely declared that the defendant had not contended that the trial court's instruction contained an erroneous statement of the law. (J.A. 53) The trial court's implication is that the instructions contained no erroneous statements of law. Neither the trial court's stated reason nor its implication is accurate. Ms. Griffin plainly declared that Government Instructions Number 21 and 22 were erroneous. (R. 340 Tr. 3155, 3156, 3254 R. 316) The trial court's instructions, i.e. Government Instructions 20 and 21, allowed the jury to have the erroneous view of the law that it was possible for the jury to find that Diane Griffin was aware of the common purpose of the conspiracy to impede the lawful functions of the Drug Enforcement Administration where, in fact, it was legal error for the jury to find that she had knowledge of the D.E.A. objective. These two instructions allowed the jury to believe that a conspiracy against either of the two agencies was sufficient to convict. The trial court did not specifically differentiate between objects insufficient as a matter of law and objects insufficiently supported by the evidence.

In essence the trial court relied on *Turner v. United States*, 396 U.S. 398, 420 (1970) for the following proposition: '(t)he general rule is that when a jury returns a guilty verdict or an indictment charging several acts in the conjunctive . . . the verdict stands if the evidence is sufficient with respect to any one of the acts charged'. (J.A. 52)

(H). THE OPINION OF THE SEVENTH CIRCUIT.

The United States Court of Appeals for the Seventh Circuit affirmed the conviction of Ms. Griffin on the grounds that there is a different rule for multiple object cases where one of them is insufficient as a matter of law and multiple object cases where one of them is insufficiently supported by the evidence. The Seventh Circuit said that the rule in *Yates v. United States*, 354 U.S. 298, 312 (1957) applied only where one of the objects of the multi-object conspiracy was unconstitutional or precluded by a statute of limitations or failed to state an offense, but that when one of the objects of the multi-object conspiracy was insufficiently supported by the evidence, the rule of *Turner v. United States*, supra, applied and under the *Turner* rule the verdict in a multiple object case would stand if the evidence was sufficient with respect to any one of the acts charged. *United States v. Beverly*, 913 F. 2d 337, 365 (7th Cir. 1990) (J.A. 117) Since the D.E.A. object of the conspiracy in the Griffin case, according to the Seventh Circuit, was insufficiently supported by the evidence as opposed to legally deficient, the *Yates* rule was inapplicable.

The Seventh Circuit noted that several Ninth Circuit cases had held 'that *Yates* does not apply to insufficiency of evidence claims'. *United States v. Beverly*, at p. 363 (J.A. 112) The Seventh Circuit made no reference to either *American Medical Association v. United States, supra*, or *Haupt v. United States, supra*.

Although it appears that the First, Fifth, Eighth, Ninth and Eleventh Circuits follow the rule that the Seventh Circuit applied in the instant case, in none of those Circuits is a reason articulated for distinguishing objects insufficient as a matter of law and objects insufficiently supported by evidence.[3]

(I). THE OPINIONS OF THE THIRD CIRCUIT.

The Circuit Court of Appeals for the Third Circuit does not differentiate between legally insufficient objects and objects insufficiently supported by evidence. In *United States v. Dansker*, 537 F. 2d 40, 51 (3d Cir. 1976) the court reversed a conviction where the evidence was insufficient to support conviction under one of the two objects. The court reviewed a conspiracy Count in which two separate briberies were the objects of a conspiracy.

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[3] See *United States v. Johnson*, 713 F. 2d 633, 645-646 & n.15 (11th Cir. 1983), *cert. denied*, 465 U.S. 1081 (1984); *United States v. Halbert*, 640 F. 2d 1000, 1008 (9th Cir. 1981); *United States v. Murray*, 621 F. 2d 1163, 1171 (1st Cir.) *cert. denied*, 449 U.S. 837 (1980); *United States v. Phillips*, 606 F. 2d 884, 886 n.1 (9th Cir. 1979), *cert. denied*, 444 U.S. 1024 (1980); *United States v. Wedelstedt*, 589 F. 2d 338, 341-342 (8th Cir. 1978), *cert. denied*, 442 U.S. 916 (1979); *United States v. James*, 528 F. 2d 999, 1014 (5th Cir.), *cert. denied*, 429 U.S. 959 (1976).

The court found that the evidence failed to support one of the briberies. The court reversed the conviction on the conspiracy Count since the general verdict may have rested solely on a finding that the defendant committed the bribery that was insufficiently supported by evidence.

In *United States v. Tarnopol*, 561 F. 2d 466 (3d Cir. 1977) the court relied upon *Dansker*. In *Tarnopol* the conspiracy count had three objects. The first object was to impede the functions of the Internal Revenue Service. The second object was to use the mails to defraud artists and writers, etc. The third object was to use the wires to defraud the same groups as in object two. The court found that the object of defrauding the Internal Revenue Service was insufficiently supported by the evidence. The court found that the other two objects had sufficient evidence to sustain a finding by a jury. The court held: "In this situation the verdict of guilty on Count 1 cannot stand if the indictment was insufficient in law and that any one of the three objects of the conspiracy did not constitute a crime or if the evidence was insufficient to sustain a finding by the jury that any one of these activities had been engaged in."

In *United States v. Brown*, 583 F. 2d 659 (3d Cir. 1978) the court followed the rule of *Dansker*. The court reversed the convictions under Counts 13 and 14 since it was impossible to determine upon which of the predicate Counts, 1, 5, 6, or 9, the jury relied upon and where the court had already determined that Counts 5 and 6 were not supported by the evidence. In *United States v. Riccobene*, 709 F. 2d 214 (3d Cir. 1983) the court restated the rule but found that there was sufficient evidence for the jury to find with regard to all four predicate acts.

Although the court repeated the rule in *United States v. Vastola*, 899 F. 2d 211, 288 (3d Cir. 1990) the court there did not reverse the conviction since the court could determine that the jury did not rely on the challenged predicate offense when reaching its verdict on the RICO charge. In *United States v. Ryan*, 828 F. 2d 1010 (3d Cir. 1987) the court cited the rule of *Dansker* to reverse Count 2 of an indictment which alleged three distinct false statements. The court found that one of the alleged false statements could not form the basis for a conviction. The court found " . . . because the verdict was a general verdict, it is impossible for us to know which factual theory formed the basis of the conviction." In *United States v. Zauber*, 857 F. 2d 137 (3d Cir. 1988) the court again repeated the rule. The court did not apply the rule because it was possible to determine that the jury did not rely on invalid predicate acts.

In *United States v. Head*, 641 F. 2d 174 (4th Cir. 1981) the defendant was charged with a conspiracy containing three objects. Two of the objects had substantial statute of limitation problems raised by the allegations of those object crimes. With regard to two of the three objects of the conspiracy, the indictment rested in large part on acts occurring beyond the statute of limitations. The Court held that defendant Head was entitled to an instruction requiring the jury to find that an overt act was committed within the limitations period before it could find him guilty. The Court held that the failure to give this *special instruction* (emphasis added) to the jury was fatal. The Court in *Head* held: "We simply have no way of knowing whether Head was convicted for an offense barred by limitations. We decline to engage in speculation of this

sort in determining guilt in a criminal case." See *Head* at p. 179.

In the instant case Griffin was entitled to a special instruction requiring the jury to find of which object of the conspiracy Griffin had knowledge when the jury found her guilty of conspiracy. The failure to give the special instruction requested by defendant Griffin to the jury was fatal. There is no way of knowing whether defendant Griffin was convicted for an offense barred on the grounds of legally insufficient evidence. This Court ought to decline to engage in speculation of this sort in determining the guilt of Griffin in this criminal case.

The United States Court of Appeals for the Second Circuit recently has held in accordance with the rule in the Third Circuit. In *United States v. Garcia*, 907 F. 2d 380 (2d Cir. 1990) the court reviewed a conspiracy charge which alleged two objects, i.e. extortion by wrongful use of fear and extortion under color of official right. In *Garcia* neither the government nor the defendant requested that special interrogatories be given to the jury in order to learn the actual basis for the decision. The defendant, however, did make a motion for dismissal on the extortion by wrongful use of fear. On review the Second Circuit found that the evidence did not support extortion by the wrongful use of fear; consequently, the court stated: "Since the jury was not given special interrogatories we cannot determine on the record the precise basis for the guilty verdicts. Therefore, for our purposes, we must assume the jury could have found the Garcias guilty of extortion under either theory presented by the

government. Consequently, if there was insufficient evidence for one of the theories, then the verdict is ambiguous and a new trial must be granted."

The Second Circuit in *Garcia* cited *United States v. Natelli*, 527 F. 2d 311 (2d Cir. 1975) as precedent for the reversal. In *Natelli* the court found that there was insufficient evidence to find one of the defendants culpable on the "earning statement" specification on a multiple specification charge. The court found that the verdict became ambiguous for the jury could have rejected the specification which the appellate court held sufficient and could have convicted only on the specification held to be insufficiently proved. In that situation, the court said, there seemed to be no alternative but to remand for a new trial. As authority the court cited *Yates v. United States* and *Stromberg v. California*.

There have been contrary findings in the Second Circuit. In *United States v. Papadakis*, 510 F. 2d 287 (2d Cir. 1975) the court followed the contrary line of precedent and held: "Where a conspiracy has multiple objectives, a conviction will be upheld so long as evidence is sufficient to show that an appellant agreed to accomplish at least one of the criminal objectives."

(J). THE SEVENTH CIRCUIT HAS CONTRADICTORY OPINIONS.

Interestingly there have been findings by the Seventh Circuit contrary to its finding in the instant case. In *United States v. Berardi*, 675 F. 2d 894 (7th Cir. 1982) the Seventh Circuit held that in order to sustain a conviction on a count charging multiple acts, it must be shown that

"there is sufficient evidence to support the charge as to each of the acts alleged". *Berardi* at 902.

However, ten years before *Berardi* the Seventh Circuit in *United States v. Tanner*, 471 F. 2d 128 (7th Cir. 1972) upheld a conspiracy conviction in a multiple objective conspiracy count even though a "one is enough" instruction was given and on appeal the Seventh Circuit had held that one of the objects of the conspiracy failed to state a federal crime. The Seventh Circuit reasoned that a reviewing court should uphold a multiple object conspiracy conviction so long as any one of the alleged objects is unchallenged. In *Tanner* the Seventh Circuit held that the bombing of a ship was not a federal crime because the ship was not within waters that would confer jurisdiction upon the federal government.

But one year after *Tanner* the Seventh Circuit in *United States v. Baranski*, 484 F. 2d 556, 560-61 (7th Cir. 1973) found that one of the object offenses in the triple object conspiracy was unconstitutional and proceeded to reverse the conviction on the conspiracy count, declining to speculate whether the conviction rested upon a permissible or impermissible ground. In *Baranski* the Seventh Circuit found that the object was based on a statute that was unconstitutional on its face for failure to give potential law enforcement officials adequate guidance with respect to conduct privileged by the First Amendment. *Baranski* at 569. The Seventh Circuit has reversed a civil general verdict where the verdict in favor of the claimant was based on a trial judge's erroneous instruction which authorized the jury to award damages on an improper basis as well as a proper basis, but 'because the jury did not return their special verdict, we will never know if it

did so (on the improper basis)'. *Needham v. White Laboratories*, 847 F. 2d 355, 364 (7th Cir. 1988).

(K). THE SEVENTH CIRCUIT HAS DRAWN A DIFFERENCE WITHOUT A DISTINCTION

It seems certain that if the statute of limitations in the instant case had run on the D.E.A. object of the conspiracy or if the D.E.A. object was unconstitutional, the Seventh Circuit would have reversed on the basis of the *Yates* rationale. Why did the Supreme Court in *Yates, Stromberg, American Medical Association, Haupt* and *Zant* have a concern that a jury not be allowed the possibility of returning a general verdict of guilty on several objects when one of the objects was insufficient – whether in law or insufficiently supported by evidence, which in actuality is also a matter of law? The obvious answer is that the Court did not want the jury to convict the defendant on an offense for which the defendant under the law could not be convicted. This seems to be a very basic Due Process concern.

One commentator who has reviewed general verdicts in criminal cases has not distinguished between alternative objects defective because not supported by evidence and objects defective because of so called legal deficiency.

> A defective alternative may be discovered only after the jury has been dismissed. This can happen when one of the alternatives is not supported by the evidence. It can also happen if one of the alternatives is defective in some other way. One alternative state of mind can be erroneously submitted to the jury, because the defendant had admitted a culpable state of mind higher than that alternative. One alternative

> may be an unconstitutional presumption supporting an inference of fact. One of the objective substantive offenses of a conspiracy conviction may be held unconstitutional. The statute of limitations may bar one alternative. In all these situations, one alternative is defective. Lauer, *Jury Agreement And The General Verdict In Criminal Cases*, 19 Land and Water Law Review 207, 218 (1984)

In her 1984 Comment, Lauer stressed several solutions, including special verdicts, jury instructions which would require jury agreement on at least one alternative and withdrawing some alternatives from jury consideration. Lauer concludes, "The courts must recognize that where one alternative is defective and special verdicts have not been used, a new trial is essential". *Id.* at p. 223.

The only remaining question is why the Seventh Circuit and other Circuits in accord with the Seventh Circuit share the Supreme Court's concern when one of the objects is constitutionally deficient or precluded by a statute of limitations or does not state an offense but these Circuits have no concern when the evidence supporting the object fails to meet a minimum legal standard of proof.

(L). FAILURE OF EVIDENCE TO MEET A MINIMUM STANDARD IS A MATTER OF LAW.

First of all, when evidence fails to meet a minimum standard of proof in court, that is a legal insufficiency.

The judge rules as a matter of law that the proof has failed and that the defendant shall not be convicted.[4]

Recently a judge of the Circuit Court of Appeals for the Seventh Circuit in a majority opinion has agreed that insufficiency of evidence is a legal insufficiency just as unconstitutionality or preclusion by the statute of limitations. Judge Flaum stated, "On the other hand, a ground supported by insufficient evidence *is* legally deficient. Indeed, it is probably more so than, for example, one that is deficient only because barred by the statute of limitations." *United States v. Townsend,* appeal from the United States District Court for the Northern District of Illinois, Eastern Division, slip opinion number 88-3271, p. 57, decided February 14, 1991. Yet, despite Judge Flaum's agreement that insufficiency of evidence is as much a legal insufficiency as unconstitutionality or preclusion of the statute of limitations, he concluded that an object not supported by sufficient evidence in a multi-object conspiracy should not be reversed but that an unconstitutional object should cause reversal. *United States v. Townsend, supra,* at p. 59.

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[4] Brodin, *Accuracy, Efficiency And Accountability In The Litigation Process – The Case For The Fact Verdict,* 59 University of Cincinnati Law Review 15, 33 (1990): "Moreover, procedural devices that circumvent the jury, such as summary judgment, directed verdict, and judgment notwithstanding the verdict, have passed constitutional muster on the reasoning that where no facts are genuinely in dispute, or where reasonable jurors could not find for the party moved against, a judge can decide the case as a matter of law. See, e.g. *Galloway v. United States,* 319 U.S. 372, 396 (upholding constitutionality of directed verdict); *Page v. Work,* 290 F. 2d 323, 334 (9th Cir. 1961) *cert. denied,* 368 U.S. 875 (upholding device of summary judgment)."

It is important to note, however, as pointed out by Professor Timothy P. O'Neill of the John Marshall Law School, " . . . that a challenge to the sufficiency of the evidence supporting a conviction . . . is itself a constitutional claim. The United States Supreme Court has clearly held that the Due Process Clause of the Fourteenth Amendment requires that sufficient evidence be presented to convince a trier of fact of the existence of every element of an offense beyond a reasonable doubt".[5] Professor O'Neill advises that it was the Seventh Circuit in *Cramer v. Fahner,* 683 F. 2d 1376, 1379-80 (7th Cir. 1982), *cert. denied,* 459 U.S. 1016 (1982) that held that the *Stromberg* rule is constitutionally based on the Due Process Clause and that the Seventh Circuit used the *Stromberg* rule to reverse an Illinois conviction by granting a *habeas corpus* petition. "The Seventh Circuit also specifically rejected the argument that *Stromberg* applied only when a count is invalid for constitutional reasons".[6]

One must follow the logic of the Seventh Circuit in *Beverly* concerning the difference it finds between objects insufficiently supported by evidence and so called legally insufficient objects. The Seventh Circuit has found it improper to have the possibility that a defendant be convicted on an object where constitutional law says that object is unconstitutional. The court has found it improper to have the possibility that a defendant be

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[5] O'Neill, *Unhappy Birthday: Illinois' 'One Good Count' Rule is 160 and Unconstitutional,* 76 Illinois Bar Journal 604 (1988). Professor O'Neill cites *Jackson v. Virginia,* 443 U.S. 307, 315-16 (1979); *In Re Winship,* 397 U.S. 358, 361-63 (1970).

[6] *Ibid;* at p. 605.

convicted on an object where the law regarding the statute of limitations precludes conviction on the object. The court has found it improper to have the possibility that a defendant be convicted on an object that does not state an offense. However, the court finds it proper to have the possibility that the defendant be convicted where the law with regard to the sufficiency of the evidence says that the defendant can not be convicted.

Obviously if the concern expressed in *Yates* is to remain in the law, i.e. that the Court does not want the possibility that a defendant be wrongfully convicted on a general jury verdict in a multi-object conspiracy case, the difference that the Seventh Circuit and other Circuits have drawn between so called legally insufficient objects and objects insufficiently supported by evidence must be viewed as the quintessential difference without a distinction.

It is well known that juries do return verdicts of guilty on cases that do not meet the legal standard for sufficiency of the evidence. That is why the law provides motions for judgment notwithstanding the verdict, motions for directed verdict and motions for judgment of acquittal both at the end of the government's evidence and at the end of all of the evidence. Rule 29, *Federal Rules of Criminal Procedure.*

The jury in the instant case had no less an erroneous view of the law when the court submitted the D.E.A. object of the conspiracy count for the jury's consideration than when the trial court in *Yates* submitted the "organizing" object of the conspiracy count to the jury. In the instant case the remedy was simple and immediately at

hand. The trial court should have given one of the defendant's jury instructions to preclude the possibility of wrongful conviction. This case ought to be reversed and remanded.

CONCLUSION

Diane Griffin, as Petitioner respectfully urges that the decision below be reversed.

Additionally, Petitioner respectfully requests that this cause be remanded for new trial.

Respectfully submitted,

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No. 90-6352

In the Supreme Court of the United States

OCTOBER TERM, 1990

DIANE GRIFFIN, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether a conviction for a multiple-object conspiracy must be set aside when the jury returns a general verdict of guilty and the evidence is insufficient to support one of the objects of the conspiracy.

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (J.A. 54-118) is reported at 913 F.2d 337.

JURISDICTION

The judgment of the court of appeals was entered on September 7, 1990. The petition for a writ of certiorari was filed on November 27, 1990, and granted on February 19, 1991. J.A. 119. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISION INVOLVED

Section 371 of Title 18 of the United States Code provides in pertinent part:

> If two or more persons conspire either to commit any offense against the United States, or to

defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Illinois, petitioner was convicted of conspiring to defraud the United States, in violation of 18 U.S.C. 371. She received a suspended sentence and was placed on probation for five years on condition that she participate in a work release program for the first six months of her probation, obtain and maintain employment, and perform 500 hours of community service. The court of appeals affirmed. J.A. 54-118.

1. Petitioner's conviction stems from her involvement with narcotics distributor Alex Beverly. The evidence at trial showed that from 1980 to 1986, Beverly controlled a large narcotics operation in Chicago, Illinois. Beverly purchased cocaine and heroin from importers and (with the help of George Brown, Betty McNulty, and others) distributed it through several gambling establishments and lounges that he owned or controlled. He used the profits to purchase real and personal property, which he frequently placed in the names of other persons, including Betty McNulty and petitioner. J.A. 55-71.

In 1988, a grand jury returned a 23-count indictment against Beverly, George Brown, Betty McNulty, petitioner, and other individuals arising from Beverly's drug operation and his attempts to conceal assets and income. J.A. 2-30. The indictment charged Beverly with managing a continuing crim-

inal enterprise, and it charged Beverly, Brown, McNulty, and others with conspiracy to violate, and violation of, various narcotics statutes and related laws. J.A. 2-17, 25-26. Most pertinent to this case, Count 20 of the indictment alleged that Beverly, McNulty, and petitioner joined in a conspiracy to defraud the federal government, in violation of 18 U.S.C. 371. J.A. 17-22. Count 20 identified two objects of the conspiracy: (1) impairment of the efforts of the Internal Revenue Service to ascertain income taxes (the IRS object); and (2) impairment of the efforts of the Drug Enforcement Administration to ascertain forfeitable assets (the DEA object). J.A. 18.

The evidence relevant to Count 20 showed that Beverly held and controlled assets in the names of both McNulty and petitioner. He arranged for McNulty to become (without capital contribution) the majority shareholder of Blacom Corporation, a company that Beverly used to control various properties he acquired through his drug operation. J.A. 65-68. Beverly also placed real estate and a Mercedes Benz automobile that he used in McNulty's name. J.A. 68-69. Following the same modus operandi, Beverly purchased a tavern and an adjoining building in petitioner's name. Petitioner filed tax returns claiming the tavern as her own in order to conceal Beverly's ownership of the business and his underreporting of income. J.A. 69, 106 & n.33. Beverly also purchased a $35,000 Jaguar automobile in petitioner's name, and Beverly and petitioner structured the payments on the car to evade federal reporting requirements for cash payments in excess of $10,000 (26 U.S.C. 6050I). J.A. 70 & n.8, 107. See also J.A. 49-50 (order denying bail pending appeal).

During the trial, petitioner unsuccessfully moved for a severance, arguing that the government had failed to prove that petitioner knew Beverly was a drug dealer or that petitioner was aware of the DEA object of the conspiracy. J.A. 76. At the close of trial, petitioner proposed jury instructions that would have required the jury to find that petitioner knew the object of the conspiracy was to impede the IRS in ascertaining Beverly's taxes. J.A. 76-77. She also asked the court to require the jury to identify, through special interrogatories, whether petitioner had knowledge of the IRS and DEA objects of the conspiracy. The court denied both the proposed jury instructions and the request for special interrogatories. The jury returned a general verdict of guilty against Beverly, McNulty, and petitioner on Count 20. J.A. 77.[1]

2. The court of appeals affirmed petitioner's conviction. The court first found that there was sufficient evidence to convict petitioner for participation in the IRS object of the conspiracy. J.A. 105-109. The court then rejected petitioner's contention that her conviction should be vacated because it was impossible to determine from the general verdict whether the jury had convicted her of conspiring to defraud the IRS, which the government had demonstrated through sufficient evidence, or conspiring to defraud the DEA, which the government had failed to prove. The court explained that when the indictment charges a multiple-object conspiracy, a general verdict can stand as long as there is sufficient evi-

[1] The jury also found Beverly, McNulty, and other defendants guilty of various other offenses. J.A. 55.

dence to support one of the objects of the conspiracy. J.A. 105, 109-118.[2]

SUMMARY OF ARGUMENT

Petitioner argues that a defendant's conviction for a multiple-object conspiracy must be set aside if, as in this case, the evidence is insufficient to show that the defendant had knowledge of one of the objects of the conspiracy. The court of appeals correctly rejected that contention. Petitioner's conviction should be sustained because, as petitioner acknowledges, there was sufficient evidence for a rational trier of fact to find that petitioner joined the conspiracy to defraud the United States and knew that that object would be achieved by impairing the Internal Revenue Service's efforts to ascertain income taxes.

1. This Court has long followed the general rule that when a jury returns a guilty verdict on a substantive count charging several criminal acts in the conjunctive, the verdict stands if the evidence is sufficient with respect to any one of the acts charged. *United States* v. *Miller*, 471 U.S. 130, 136 (1985); *Turner* v. *United States*, 396 U.S. 398, 420 (1970). Similarly, when a conspiracy count identifies several objects of the conspiracy in the conjunctive, a jury's general verdict of guilty should stand if there is sufficient evidence as to any of the objects. Most courts

[2] The court of appeals affirmed the convictions and sentences of the other defendants. J.A. 54-105, 118. With respect to McNulty's challenge to her conviction on the charge of conspiracy to defraud the government, the court found that the evidence against her was sufficient to establish both the IRS object and the DEA object of the conspiracy. J.A. 98-100. This Court denied Beverly's petition for a writ of certiorari on January 14, 1991. *Beverly* v. *United States*, 111 S. Ct. 766 (1991).

of appeals follow that approach. Only the Third Circuit has consistently held that a conspiracy conviction must be vacated if the government fails to prove all the objects identified in the indictment.

2. The Court's decisions in cases such as *Yates* v. *United States*, 354 U.S. 298 (1957), which have set aside convictions where the jury received incorrect legal instructions as to one of several alternative bases for conviction, do not support petitioner's position. When a trial court incorrectly instructs the jury as to the law, it creates the possibility that a rational jury might convict the defendant based on conduct that is not a crime. That principle does not apply, however, when the jury has been properly instructed and the issue is simply whether the evidence is sufficient to support the conviction. Our judicial system assumes that once a jury is correctly instructed, it is capable of correctly analyzing the evidence. The standard for reviewing jury verdicts is premised on that assumption; reviewing courts do not ask whether the jury in each case reached its verdict in a rational way, but only whether the evidence was sufficient to allow a hypothetical rational jury to find the defendant guilty. Thus, when the evidence is sufficient to convict a defendant on one, but not all, of several theories, the reviewing court's task is at an end, since the jury could rationally have convicted on the theory for which there was sufficient evidence.

3. When the evidence as to one conspirator fails to show that that conspirator shared in every object of the conspiracy, the district court is not required to submit special interrogatories to the jury or give the jury a special instruction with respect to that defendant. To be sure, in many cases the use of special interrogatories can avoid problems arising

from factual or legal infirmities affecting one object of a multiple-object conspiracy charge. For that reason, we believe that in some settings the use of special interrogatories is appropriate and should be encouraged. Nonetheless, the use of special interrogatories can sometimes generate jury confusion, and in a particular case may create more problems than it solves. The decision whether to use special interrogatories in a particular case should therefore be left to the district court's discretion. When a district court decides not to use special interrogatories, the court's decision should not lead to reversal simply because the evidence with respect to a particular defendant turns out to be insufficient as to one of the objects of the conspiracy.

The same principle should apply to the court's decision whether to instruct the jury that certain objects do not apply to certain defendants. Such an instruction can be more confusing than enlightening when several defendants are charged with a single multiple-object conspiracy, particularly when the evidence is sufficient, with respect to some defendants, on all the objects of the conspiracy. As long as the evidence is sufficient to support the jury's verdict on at least one of the objects of the conspiracy, and as long as there is no legal error infecting the jury's verdict, the reviewing court's traditional task is at an end and the jury's verdict should stand.

ARGUMENT

A CONVICTION OF A MULTIPLE-OBJECT CONSPIRACY IS NOT SUBJECT TO REVERSAL BECAUSE THE EVIDENCE IS INSUFFICIENT TO SUPPORT ONE OF THE OBJECTS OF THE CONSPIRACY

A. A Reviewing Court Should Evaluate The Sufficiency Of The Evidence In Multiple-Object Conspiracy Cases Under The Same Rule That Applies In Other Cases

1. This Court has repeatedly emphasized that appellate courts perform a limited function in reviewing jury verdicts. The reviewing court does not "weigh the evidence or * * * determine the credibility of witnesses." *Glasser* v. *United States*, 315 U.S. 60, 80 (1942). Nor does it attempt to determine how the jury reached its verdict. Rather, the sole question for the court is whether there is sufficient evidence to permit a rational jury to find the defendant guilty. *United States* v. *Powell*, 469 U.S. 57, 67 (1984); *Jackson* v. *Virginia*, 443 U.S. 307, 318-319 (1979); *Burks* v. *United States*, 437 U.S. 1, 17 (1978).

That principle applies even if the evidence at trial fails to prove all of the allegations in the indictment, as this Court held in *United States* v. *Miller*, 471 U.S. 130 (1985). The indictment in *Miller* charged two types of fraud, while the evidence showed only one.[3] The precise issue in *Miller* was whether the grand jury guarantee of the Fifth Amendment is violated "when a defendant is tried under an indictment that alleges a certain fraudulent scheme but is convicted based on trial proof that supports only a significantly narrower and more limited, though included, fraudulent scheme." 471 U.S. at 131. The Court affirmed the conviction, holding that the verdict was valid as long as the allegations proved at trial were contained within, even if not as broad as, the charge in the indictment. In reaching that conclusion, the Court relied in part on the proposition that when a jury returns a guilty verdict on a count charging several acts in the conjunctive, "the verdict stands if the evidence is sufficient with respect to any one of the acts charged." *Miller*, 471 U.S. at 136, quoting *Turner* v. *United States*, 396 U.S. 398, 420 (1970). See also *Crain* v. *United States*, 162 U.S. 625, 634-636 (1896) (citing 19th Century cases and commentary).

The "general rule," *Turner*, 396 U.S. at 420, that a verdict is valid if the evidence establishes any offense charged in the count at issue, applies with no less force in the case of an indictment charging a multiple-object conspiracy. The reviewing court's role in that setting is no different than in the case of an ordinary substantive offense. The court's inquiry in either case is limited to whether the evidence was sufficient to permit a rational jury to find the defendant guilty beyond a reasonable doubt of the crime charged in the indictment.

If petitioner's position were adopted and conspiracies were treated differently from other crimes, reviewing courts would be forced to draw distinctions having no principled basis. Assume, for example, that a defendant is charged with the offense of defrauding an insurer through two means and the offense of conspiring to defraud the insurer through the same two means. *Turner* and *Miller* establish

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[3] The defendant in *Miller* was convicted of mail fraud, 18 U.S.C. 1341, in connection with an insurance claim he made following the burglary of his place of business. The indictment alleged that the defendant defrauded an insurer both by consenting to the burglary and by lying to the insurer about the value of the loss. 471 U.S. at 131-132. The evidence at trial, however, concerned only the latter allegation. *Id.* at 132-133.

that even if the government fails to prove that both means were employed in committing the substantive offense, the conviction would nonetheless stand. In petitioner's view, however, a different rule would apply to conspiracy cases, and the reviewing court would have to set aside the conspiracy conviction if the government's proof failed to prove that both means were among the objects of the conspiracy. There is no logical or doctrinal basis for such a distinction, and this Court should not adopt it.

2. The court of appeals correctly held, in accordance with the principles of *Miller* and *Turner*, and consistently with most circuit court decisions, that a verdict of guilty on an indictment charging a multiple-object conspiracy must be affirmed if the reviewing court finds that the evidence is sufficient as to any one of the objects. J.A. 109-117. The First, Second, Fifth, Eighth, Ninth, and Eleventh Circuits appear to follow the rule that the court of appeals applied in this case. See *United States* v. *Bilzerian*, 926 F.2d 1285, 1302 (2d Cir. 1991); *United States* v. *Johnson*, 713 F.2d 633, 645-646 & n.15 (11th Cir. 1983), cert. denied, 465 U.S. 1081 (1984); *United States* v. *Halbert*, 640 F.2d 1000, 1008 (9th Cir. 1981); *United States* v. *Murray*, 621 F.2d 1163, 1171 (1st Cir.), cert. denied, 449 U.S. 837 (1980); *United States* v. *Phillips*, 606 F.2d 884, 886 n.1 (9th Cir. 1979), cert. denied, 444 U.S. 1024 (1980); *United States* v. *Wedelstedt*, 589 F.2d 339, 341-342 (8th Cir. 1978), cert. denied, 442 U.S. 916 (1979); *United States* v. *James*, 528 F.2d 999, 1014 (5th Cir.), cert. denied, 429 U.S. 959 (1976).

This rule is not a new principle of law. As the Fifth Circuit stated in *James*:

> It has always been the law that where an indictment alleges a conspiracy to commit several offenses against the United States, the charge is sustained by adequate pleadings and proof of conspiracy to commit any one of the offenses.

528 F.2d at 1014, citing *United States* v. *Frank*, 520 F.2d 1287, 1293 (2d Cir. 1975), cert. denied, 423 U.S. 1087 (1976); *United States* v. *Papadakis*, 510 F.2d 287, 297 (2d Cir.), cert. denied, 421 U.S. 950 (1975); *United States* v. *Grizaffi*, 471 F.2d 69, 73 (7th Cir. 1972), cert. denied, 411 U.S. 964 (1973); *McWhorter* v. *United States*, 62 F.2d 829 (5th Cir. 1933); *Christiansen* v. *United States*, 52 F.2d 950 (5th Cir. 1931); *Hogan* v. *United States*, 48 F.2d 516 (5th Cir.), cert. denied, 284 U.S. 668 (1931). Similarly, the Second Circuit, speaking on separate occasions through Judge Friendly and Judge Learned Hand, has held that "where an indictment charged a conspiracy to engage in three offenses and only one was proved, the conviction could still stand." *United States* v. *Dixon*, 536 F.2d 1388, 1401-1402 (1976) (Friendly, J.), citing *United States* v. *Mack*, 112 F.2d 290, 291 (1940) (Hand, J.).[4]

3. Petitioner notes that circuit courts occasionally have departed from the result we urge.[5] For the

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[4] See also *United States* v. *Townsend*, 924 F.2d 1385, 1412-1414 (7th Cir. 1991); *United States* v. *Mowad*, 641 F.2d 1067, 1073-1074 (2d Cir.), cert. denied, 454 U.S. 817 (1981); *United States* v. *Tanner*, 471 F.2d 128, 140 (7th Cir.), cert. denied, 409 U.S. 949 (1972); *McDonnell* v. *United States*, 19 F.2d 801, 803 (1st Cir.), cert. denied, 275 U.S. 551 (1927); *Moss* v. *United States*, 132 F.2d 875, 877-878 (6th Cir. 1943); *Bailey* v. *United States*, 5 F.2d 437, 438 (5th Cir. 1925); *Kepl* v. *United States*, 299 F. 590, 591 (9th Cir. 1924); 1 J. Bishop, *New Criminal Procedure* § 434 (2d ed. 1913).

[5] See *United States* v. *Garcia*, 907 F.2d 380, 381 (2d Cir. 1990); *United States* v. *Griffin*, 699 F.2d 1102, 1104 n.9 (11th Cir. 1983); *United States* v. *Irwin*, 654 F.2d 671, 680 (10th Cir. 1981), cert. denied, 455 U.S. 1016 (1982); *United States*

most part, however, those departures have proceeded without acknowledgement or analysis of—and in seeming inadvertence to—the prevailing rule. Only the Third Circuit has consistently held that when an indictment alleges several conspiracy objects and predicate offenses, the evidence must be sufficient to prove all of them if the court cannot determine which specific offenses or objects the jury relied upon in reaching its verdict.[6]

The Third Circuit adopted its rule out of concern that where there is "a failure of proof" with respect to one of several alleged objects of the conspiracy, the jury may have based its verdict on the unproved object. See *United States* v. *Tarnopol*, 561 F.2d 466, 474-475 (1977); *United States* v. *Dansker*, 537 F.2d 40, 51 (1976), cert. denied, 429 U.S. 1038 (1977). That reasoning, however, is inconsistent with this Court's decisions in *Miller* and *Turner*, which require only that the reviewing court determine that the evidence is sufficient to justify a rational jury in finding the defendant guilty of the crime charged in the indictment.

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v. *Head*, 641 F.2d 174, 179 (4th Cir. 1981), cert. denied, 462 U.S. 1132 (1983); *Van Liew* v. *United States*, 321 F.2d 664 (5th Cir. 1963).

[6] See *United States* v. *Vastola*, 899 F.2d 211, 228 (RICO, dictum), cert. granted and judgment vacated on other grounds, 110 S. Ct. 3233 (1990); *United States* v. *Zauber*, 857 F.2d 137, 151-152 (1988) (RICO, dictum), cert. denied, 489 U.S. 1066 (1989); *United States* v. *Riccobene*, 709 F.2d 214, 227 (RICO, dictum), cert. denied, 464 U.S. 849 (1983); *United States* v. *Brown*, 583 F.2d 659, 669 (1978) (RICO), cert. denied, 440 U.S. 909 (1979); *United States* v. *Tarnopol*, 561 F.2d 466, 474 (1977) (conspiracy); *United States* v. *Dansker*, 537 F.2d 40, 51 (1976) (conspiracy), cert. denied, 429 U.S. 1038 (1977). See also *United States* v. *Ryan*, 828 F.2d 1010, 1015 (1987) (false statements).

This Court "has long recognized that an indictment may charge * * * the commission of any one offense" —including conspiracy—"in several ways." *Miller*, 471 U.S. at 136. If the reviewing court determines that the evidence is sufficient to permit a jury to find at least one of the several unlawful objects identified in the indictment, then under the traditional standard for reviewing jury verdicts, the evidence is sufficient to establish that element of the crime. Moreover, even if speculation about the actual basis for the verdict were permitted, the majority approach would be consistent with any reasonable hypothesis regarding the actual basis for the jury's verdict. It would be unreasonable to assume that the jury would choose to reject the sufficiently proved object and rely on the insufficiently proved object instead.

4. The same principles apply when, as in this case, the evidence on the second object of the conspiracy is not insufficient as to all the defendants, but only as to one. It is undisputed that the evidence at trial was sufficient as to defendants Beverly and McNulty with respect to both the IRS object and the DEA object of the conspiracy. This is therefore not a case in which the entire conspiracy was narrower than that charged in the indictment. Rather, it is a case in which the conspiracy was as broad as charged, but in which one of the conspirators was unaware of one of the means by which the fraudulent purpose of the conspiracy was to be achieved.

The disparity in the evidence as to petitioner and the other conspirators does not exonerate petitioner from liability for her membership in the conspiracy, nor does it suggest that she was a member of a conspiracy different from the one charged in the indictment. It is a familiar principle of conspiracy law that a

jury may properly find a particular defendant guilty of a charged conspiracy without finding that the defendant was aware of or contributed to all the alleged objects of the conspiracy.[7]

This Court's analysis in *Berger* v. *United States*, 295 U.S. 78 (1935), is enlightening on that point. The question in *Berger* was whether Berger's conviction under a conspiracy indictment could be sustained where the evidence at trial showed that Berger was not a party to every aspect of the charged conspiracy. In analyzing Berger's claim, the Court suggested a hypothetical situation where, rather than

[7] See, *e.g.*, *United States* v. *Rapp*, 871 F.2d 957, 964-965 (11th Cir.) (defendants convicted of conspiracy based on agreement to further two objectives of that conspiracy, even though evidence did not show their knowledge of another purpose of the conspiracy), cert. denied, 110 S. Ct. 233 (1989); *United States* v. *Adams*, 759 F.2d 1099, 1114 (3d Cir.) ("[k]nowledge of all the particular aspects, goals, and participants of a conspiracy * * * is not necessary"), cert. denied, 474 U.S. 906 (1985); *United States* v. *Williams*, 737 F.2d 594, 615 (7th Cir. 1984) ("a conspirator need not know the details * * * or every objective of the conspiracy"), cert. denied, 470 U.S. 1003 (1985); *United States* v. *Escalante*, 637 F.2d 1197, 1200 (9th Cir.), cert. denied, 449 U.S. 856 (1980) ("In order to be a co-conspirator, one need not know all the purposes of and participants in the conspiracy."); *United States* v. *Gleason*, 616 F.2d 2, 16 (2d Cir. 1979) ("To be convicted as a member of a conspiracy, a defendant need not know every objective of the conspiracy."), cert. denied, 444 U.S. 1082 (1980); *United States* v. *Bolts*, 558 F.2d 316, 325 (5th Cir.) ("Determining whether [a defendant] agreed to a particular objective is thus unnecessary in a case involving a conspiracy with multiple and related criminal objecitves."), cert. denied, 434 U.S. 930 (1977); *United States* v. *Rodriguez*, 585 F.2d 1234, 1249 (5th Cir. 1978) ("the government need prove only that a conspirator agreed to one of the many objectives charged"), aff'd on other grounds, 450 U.S. 333 (1981).

charging one conspiracy, the indictment charged two smaller conspiracies, each having a different object. The Court observed that a defendant could properly be convicted on one count of conspiracy based on evidence at trial that established his participation in one of the smaller conspiracies. It concluded that the "situation supposed and that under consideration" did not "differ in real substance." *Id.* at 83.

The same analysis can be applied to this case. As in *Berger*, even if petitioner were regarded as having been a member of a narrower conspiracy than the one charged in Count 20, the variance between the charge and the proof would not affect her in any substantial way. There was ample evidence to convict her of conspiracy based on the IRS object. In addition, there was little or no risk of jury confusion because of the evidence against the other defendants with respect to concealment of assets from the DEA. *A fortiori*, petitioner was not prejudiced by being tried together with her co-defendants for a single multiple-object conspiracy, even though the evidence established her participation with respect to only one of the two objects of that conspiracy. The absence of any risk of prejudice is particularly clear in this case, where the prosecutor explicitly advised the jury that with respect to petitioner the government was relying entirely on the sufficiently proved object (the IRS object) and not on the other charged object (the DEA object) to establish petitioner's participation in the conspiracy. See Tr. 3571.

5. The position we urge in this case, besides being consistent with the prevailing legal rule, ensures the efficient use of limited trial resources. The federal government frequently prosecutes multiple-object conspiracies involving complex factual situations. It is

not unusual in such cases for a reviewing court to conclude that the evidence to support the conspiracy is sufficient, but the evidence with regard to one of the subsidiary objects is not. Under petitioner's approach, every case of that sort would have to be retried.

The costs that retrying these cases would impose on the prosecution, the defense, the courts, and witnesses would be substantial. The benefits, by contrast, would be minimal. As the Seventh Circuit recently explained:

> It is one thing to negate a verdict that, while supported by evidence, may have been based on an erroneous view of the law; it is another to do so merely on the chance—remote, it seems to us—that the jury convicted on a ground that was not supported by adequate evidence when there existed alternative grounds for which the evidence was sufficient.

United States v. *Townsend*, 924 F.2d at 1414. Little stands to be gained in questioning a jury verdict when the trial is properly conducted, the jury is correctly instructed on the law, and there is adequate evidence to support the jury's verdict. Indeed, a retrial, which inevitably must be conducted at a later date when witnesses or physical evidence may have disappeared and memories may have faded, would in many instances severely compromise the truth-finding process.

B. The Decisions Of This Court Requiring A Reviewing Court To Vacate A Conviction If The Indictment Or Jury Instructions Are Legally Flawed Do Not Govern This Case

1. Petitioner argues that the court of appeals' ruling is inconsistent with this Court's decisions in a line of cases setting aside verdicts because of legal

flaws in the indictments or jury instructions. See *Yates* v. *United States*, 354 U.S. 298 (1957); *Cramer* v. *United States*, 325 U.S. 1, 36 n.45 (1949); *Williams* v. *North Carolina*, 317 U.S. 287, 291-292 (1942); *Stromberg* v. *California*, 283 U.S. 359, 367-370 (1931). As the court of appeals correctly recognized, however, those cases all deal with the situation where the jury acted under a mistaken understanding of the law. They are not applicable to the situation where the jury is correctly instructed on the legal standards, but the government has failed, in some respect, to prove the factual elements of its case. See J.A. 110 & n.34.

Yates illustrates the distinction. The defendant was charged under the Smith Act, 18 U.S.C. 2385, with participating in a conspiracy to advocate the violent overthrow of the government and to organize a society or group for that purpose. 354 U.S. at 300. After determining that the district court incorrectly instructed the jury as to the latter object, the Court vacated the conviction, stating:

> In these circumstances we think the proper rule to be applied is that which requires a verdict to be set aside in cases where the verdict is supportable on one ground, but not on another, and it is impossible to tell which ground the jury selected.

Id. at 312. As the court of appeals explained, *Yates* was a case in which the jury, incorrectly instructed on the law, might have convicted the defendant for engaging in conduct that was not a crime. That rule does not apply when the reviewing court determines that the jury was properly instructed, and when the only flaw is a lack of evidence as to one of the alleged objects. In that setting, the principle set forth in *Turner* controls: the jury is presumed to have cor-

rectly evaluated the evidence and to have convicted the defendant on the theory for which there was sufficient evidence.

The same distinction explains *Stromberg*, *Williams*, and *Cramer*. In *Stromberg*, the defendant was convicted under a California statute prohibiting the display of a red flag in a public place as: (a) a symbol of opposition to organized government; (b) an invitation to anarchistic action; or (c) an aid to seditious propaganda. See 283 U.S. at 361. The Court concluded that the first clause of the statute violated the First Amendment, *id.* at 369, and vacated the conviction because "the conviction * * * may have rested on that clause exclusively," *id.* at 370.

In *Williams*, the defendants were convicted of the North Carolina crime of bigamous cohabitation. The jury was instructed that it could disregard the defendants' precohabitation Nevada divorce decrees on the ground either that North Carolina did not recognize decrees based on substituted service or that the decrees were procured through fraud. See 317 U.S. at 290-291. This Court determined that the Full Faith and Credit Clause required North Carolina to recognize divorce decrees based on substituted service. It therefore vacated the convictions, observing that the verdict was "a general one," and that it "follows here as in *Stromberg* v. *California*, * * * that if one of the grounds for conviction is invalid under the Federal Constitution, the judgment cannot be sustained." 317 U.S. at 291, 292.

In *Cramer*, the defendant was charged with treason based on several acts, including his post-arrest false statements to the FBI. The Court observed:

> The verdict in this case was a general one of guilty, without special findings as to the acts on which it rests. Since it is not possible to identify the grounds on which Cramer was convicted, the verdict must be set aside if any of the separable acts submitted was insufficient [citing *Stromberg* and *Williams*].

325 U.S. at 36 n.45. The Court questioned whether lying to the FBI under the circumstances could legally constitute treason, but the Court found no need to reach that issue because it reversed on the ground that other charged acts of treason did not, as a matter of law, constitute treason. *Id.* at 36 n.45, 37-40. Thus, the Court's statements in *Stromberg*, *Williams*, and *Cramer*, that "insufficient" multiple-object verdicts must be set aside, were all made in the context of *legal* insufficiency—that is, where the jury may have found that the defendant committed the acts, but those acts, as a matter of law, did not constitute crimes.[8]

2. This Court's decisions in *Yates*, *Cramer*, *Williams*, and *Stromberg* do not explicitly distinguish between legal and factual insufficiency. Nevertheless,

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[8] The court of appeals' opinion in *Cramer* makes it quite clear that the issue in that case was regarded as one of *legal* as opposed to *evidentiary* insufficiency. See *United States* v. *Cramer*, 137 F.2d 888 (2d Cir. 1943). The court of appeals distinguished the *Cramer* case from cases in which multiple overt acts are submitted to the jury and the conviction is upheld as long as the evidence is sufficient with respect to any one of them. In the latter class of cases, the court observed, 137 F.2d at 893,

> it can be presumed upon a conviction that the jury has properly fulfilled its time-honored function of weighing the evidence and that its finding of guilt was based on the one sufficiently proved overt act. But the jury was never intended, nor, indeed, is it properly equipped, itself to determine the legal sufficiency, as distinguished from the evidentiary sufficiency, of the overt acts alleged.

the Court's statements in those cases "must be taken in the context in which [they were] made," *Air Courier Conference* v. *American Postal Workers Union*, 111 S. Ct. 913, 920 (1991), and the context was that of legal insufficiency. Moreover, the distinction between legal and factual insufficiency is solidly grounded in the logic of those decisions. Indeed, it reflects two well-established and complementary premises concerning the jury's discharge of its functions.

Our judicial system presumes that jurors follow the trial judge's instructions on the law. See *Richardson* v. *Marsh*, 481 U.S. 200, 206-207 (1987). For that reason, when a judge incorrectly instructs the jury as to the law, and thereby creates a significant risk that a jury might have convicted the defendant based on conduct that is not a crime, the defendant is entitled to a new trial. Our judicial system also presumes, however, that once the jury is properly instructed, it is capable of correctly analyzing the evidence. See *Duncan* v. *Louisiana*, 391 U.S. 145, 157 (1968). Thus, where the evidence is sufficient to convict the defendant on one but not all of several theories, the reviewing court is justified in concluding that the jury convicted on the theory for which there was sufficient evidence.

Petitioner suggests that there is no distinction between factual and legal insufficiency, because a reviewing court examines the sufficiency of the evidence "as a matter of law." That argument, we submit, misses the point. A reviewing court may invalidate a jury's guilty verdict if it concludes, as a matter of law, that the evidence is insufficient to support the verdict. When a court addresses that issue, "the relevant question is whether, after reviewing the evidence in the light most favorable to the prosecution,

any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson*, 443 U.S. at 319. Applying that standard, a reviewing court should not invalidate a jury verdict if the indictment alleges that a conspiracy has two or more objects, and there is sufficient evidence to support one of those objects. In that situation, a rational trier of fact could properly find the essential elements of the crime beyond a reasonable doubt.

In short, there is a sound basis for applying the *Yates* rule in situations involving legal, but not factual, insufficiency. As the Seventh Circuit recently explained:

> It is consistent with our conception of the jury's role, and to reject it would force us, by dint of logic, at any rate, to consider radically revising that role. That is not, we believe, what the Supreme Court had in mind when it created the [*Yates*] rule.

United States v. *Townsend*, 924 F.2d at 1414. The court of appeals correctly determined in this case that the evidence was sufficient to establish that petitioner participated in the IRS object of the conspiracy. That determination is sufficient to sustain petitioner's conviction.

3. Petitioner relies on statements contained in three of this Court's other decisions that, petitioner asserts, support application of the *Yates* rule to cases of factual insufficiency. See *Zant* v. *Stephens*, 462 U.S. 862, 881 (1983); *Haupt* v. *United States*, 330 U.S. 631, 641 & n.1 (1947); *American Medical Ass'n* v. *United States*, 317 U.S. 519, 531-533 (1943). In *Zant*, this Court reinstated the defendant's sentence, while in *Haupt* and *American Medical Ass'n* the Court affirmed the convictions under review. Thus,

the statements that petitioner cites are dicta as to the issue presented here. Moreover, only in the *Haupt* case did the Court's statement provide any support for petitioner's position that reversal is required when one of several objects is found to suffer from factual, as opposed to legal, insufficiency, and even that statement is distinguishable on the basis of the facts of the case from which it arose.

In *Zant*, the respondent argued that, under *Stromberg*, a death sentence must be set aside if one of several statutory aggravating circumstances underlying the jury verdict is determined to be unconstitutionally vague. 462 U.S. at 866-868, 880. This Court recited the *Stromberg* rule, but determined that *Stromberg* did not require setting aside the sentence, "because the jury did not merely return a general verdict stating that it had found at least one aggravating circumstance. The jury expressly found aggravating circumstances that were valid and legally sufficient to support the death penalty." *Id.* at 881. Thus, this Court's statements in *Zant*, which were addressed to the effect of a legally insufficient ground for imposing the sentence (unconstitutional vagueness), are consistent with our understanding of the *Stromberg/Yates* line of cases.

In *American Medical Ass'n*, the defendants were convicted on an indictment that charged a single Sherman Act conspiracy having five anticompetitive purposes. 317 U.S. at 519. The defendants contended that the indictment effectively "charges five separate conspiracies defined by their separate and recited purposes" and that "they were entitled to have the trial court rule upon the sufficiency in law of each of these charges and, as this was not done, the general verdict cannot stand." *Id.* at 531. The defendants further contended that "the last two purposes specified cannot constitute violations of [the Sherman Act] and the jury should have been so instructed." *Ibid.* The Court rejected the defendants' claim, stating, *ibid.*:

> If in fact the indictment charges a single conspiracy to obstruct or restrain the business of Group Health, and if the recited purposes are really only subsidiary to that main purpose or aim, or merely different steps toward the accomplishment of that single end, and if the cause was submitted to the jury on that theory, these contentions fail.

Rather than helping petitioner, the Court's discussion of that point is quite damaging to her argument. The effect of the quoted passage is that, at least where a single conspiracy offense is charged, and where the listed purposes of the conspiracy are properly characterized as "subsidiary to" or "steps toward the accomplishment of" the goal of the conspiracy, the conviction could not be challenged on the ground that some of those subsidiary purposes or means were invalid.

The analogy to this case is a close one. Count 20 of the indictment charged a single conspiracy to defraud the United States. That unlawful end, the indictment alleged, was to be achieved by concealing assets from the IRS and the DEA. Under the *American Medical Ass'n* case, any failure of proof as to one of those means of effecting the purpose of the conspiracy would not affect the validity of the jury's verdict as long as the evidence was sufficient to show a violation of the single offense charged—conspiring to defraud the United States.

Moreover, the issue in *American Medical Ass'n*, as in the other cases relied on by petitioner, was one of legal sufficiency. See 317 U.S. at 533 ("The petitioners in effect challenge the sufficiency in law of the

indictment. They hardly suggest that if the pleading charges an offense there was no substantial evidence of the commission of the offense."). *American Medical Ass'n* therefore provides no support at all for petitioner's challenge to her conviction.

In *Haupt*, the defendant sought reversal of his conviction for treason on the ground that the government failed to prove that the defendant gave assistance or comfort to enemy agents. 330 U.S. at 632, 634-635. The Court concluded that in *Haupt*, unlike in *Cramer*, there was no question that the charged acts were sufficient as a matter of law to constitute treason. 330 U.S. at 635. In addition, it concluded that the evidence was sufficient to prove each of the acts submitted to the jury. *Id.* at 636-644. Accordingly, the Court expressly declined to "reach the question whether the conviction could stand on some sufficiently proven acts if others failed in proof." *Id.* at 640-641.

Although the Court did not reach that issue, it suggested in an accompanying footnote:

> As the acts were here pleaded in a single count, and the jury were instructed that they could convict on any one, we would have to reverse if any act were insufficient or insufficiently proved. *Cf. Stromberg* v. *California*, 283 U.S. 359, 368; *Williams* v. *North Carolina*, 317 U.S. 287, 292, and *Cramer* v. *United States*, *supra*.

Haupt, 330 U.S. at 641 n.1. We recognize that the Court's passing footnote reference to an "insufficiently proved" object supports petitioner's argument. That reference, however, is not controlling here because it was a mere "dictum unnecessary to the decision in that case." *McDaniel* v. *Sanchez*, 452 U.S. 130, 141 (1981). As Chief Justice Marshall explained 170 years ago:

> It is a maxim not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision. The reason of this maxim is obvious. The question actually before the Court is investigated with care, and considered to its full extent. Other principles which may serve to illustrate it, are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated.

Cohens v. *Virginia*, 19 U.S. (6 Wheat.) 264, 399-400 (1821). See also *Third National Bank* v. *Impac Limited, Inc.*, 432 U.S. 312, 319 n.9 (1977); *Wright* v. *United States*, 302 U.S. 583, 593-594 (1938); *Williams* v. *United States*, 289 U.S. 553, 568 (1933). That maxim holds especially true in this case. As we have explained, the rule is settled in non-conspiracy cases that a "verdict stands if the evidence is sufficient with respect to any one of the acts charged." *Miller*, 471 U.S. at 136, quoting *Turner*, 396 U.S. at 420. The *Haupt* dictum is inconsistent with that settled rule. That isolated dictum, which did not arise in a conspiracy case and provides no answer to the logic of the court of appeals' analysis in this case, should not serve as the basis for overturning the *Miller/Turner* rule or creating a special "conspiracy exception" to that rule.

In any event, the dictum in *Haupt* can be distinguished in light of the context in which it arose, even if that dictum is correct as applied to substantive offenses such as those involved in *Haupt* itself. Under the law of treason, each overt act in a count charging

treason in effect constitutes a separate substantive violation. See *Cramer* v. *United States*, 325 U.S. at 34-35. *Haupt* involved multiple alleged overt acts of treason, all of which were charged together in a single count. The count could thus be said to be duplicitous, and to raise concerns about which of the several substantive offenses charged in that count the jury found the defendant to have committed.[9] In this case, by contrast, there was only a single conspiracy charged in Count 20 of the indictment, even though the conspiracy was alleged to have several objectives. Because Count 20 charged only a single offense, it could not be characterized as duplicitous, and there could be no doubt about what offense the jury found petitioner to have committed. Therefore, as in the *American Medical Ass'n* case, there is no reason for concern that the jury may have found petitioner guilty of an offense for which the evidence was insufficient.[10]

[9] The same analysis serves to distinguish the cases holding that when multiple specifications of perjury or obstruction of justice are charged in a single count, the evidence must be sufficient as to each specification in order for the conviction on that count to be upheld. See *United States* v. *Natelli*, 527 F.2d 311 (2d Cir. 1975), cert. denied, 425 U.S. 934 (1976); *United States* v. *Berardi*, 675 F.2d 894 (7th Cir. 1982). Because each specification constitutes a separate offense, the prosecution can avoid that problem by charging each offense in a separate count.

[10] In this respect, this case resembles *Schad* v. *Arizona*, No. 90-5551, which is currently pending before this Court. The issue in *Schad* is whether the jury must be unanimous with respect to all possible means that a defendant may have used to commit a charged offense. In our view, unanimity is not required with respect to the means used to commit an offense; a jury is required to be unanimous only with respect to whether the defendant committed the offense charged. Therefore, as long as a single count charges only a single offense, unanimity is required only with respect to the issue of guilt or innocence on that count. Just as a general unanimity charge is adequate to ensure the requisite unanimity among the jurors when a single offense is charged in a particular count (regardless of the alternative means alleged in that count), a general reasonable doubt instruction is adequate to ensure the proper approach to weighing the evidence when a single conspiracy offense is charged in a single count (even if the count alleges multiple objects of the conspiracy).

C. The District Court Was Not Required To Use Special Interrogatories or Special Jury Instructions To Focus The Jury's Attention On Petitioner's Role In The Conspiracy

Petitioner argues that the problems resulting from insufficiency in one object of a multiple-object conspiracy can often be avoided by the use of special interrogatories, in which the jury is directed to indicate which objects of the conspiracy it found to have been proved.[11] We agree that special interrogatories can be a valuable tool in cases such as conspiracy or RICO prosecutions where there is doubt as to the legal validity of a particular object or predicate act. See, *e.g.*, *United States* v. *Aguilar*, 883 F.2d 662, 690-691 (9th Cir. 1989), cert. denied, 111 S. Ct. 751 (1991); *United States* v. *Coonan*, 839 F.2d 886 (2d Cir. 1988); *United States* v. *Ruggiero*, 726 F.2d 913, 922-923 (2d Cir.), cert. denied, 469 U.S. 831 (1984). The government often proposes the use of special in-

[11] While the term "special verdict" is sometimes used interchangeably with the term "special interrogatory," the terms have different meanings in civil practice. A "special verdict" is used to elicit findings by the jury in the absence of a general verdict, see Fed. R. Civ. P. 49(a), while "special interrogatories" are used in conjunction with a general verdict, see Fed. R. Civ. P. 49(b).

terrogatories in such cases in order to avoid the need for a retrial if one predicate act or object turns out to have a legal flaw. See, *e.g.*, *United States* v. *Boffa*, 688 F.2d 919 (3d Cir. 1982), cert. denied, 465 U.S. 1066 (1984); *United States* v. *Palmeri*, 630 F.2d 192, 202-203 (3d Cir. 1980), cert. denied, 450 U.S. 967 (1981); *United States* v. *O'Looney*, 544 F.2d 385, 392 (9th Cir.), cert. denied, 429 U.S. 1023 (1976). But the use of special interrogatories is not always suitable, and this Court and others have discouraged routine use of the practice. See *Stein* v. *New York*, 346 U.S. 156, 178 (1953) ("no general practice of these techniques [special verdicts and interrogatories] has developed in American criminal procedure"); *United States* v. *Spock*, 416 F.2d 165, 180-182 (1st Cir. 1969); *United States* v. *Wilson*, 629 F.2d 439, 443 (6th Cir. 1980); *United States* v. *James*, 432 F.2d 303, 307-308 (5th Cir. 1970), cert. denied, 403 U.S. 906 (1971); *Gray* v. *United States*, 174 F.2d 919 (8th Cir.), cert. denied, 338 U.S. 848 (1949).

The proper course, in our view, is to leave to the discretion of the district courts the decision whether to use special interrogatories in a particular case. See *United States* v. *Ruggiero*, 726 F.2d at 927-928 (Newman, J., concurring in part and dissenting in part). In some cases, special interrogatories can be very beneficial in facilitating subsequent review of the verdict and can be used without running an undue risk of confusing the jury or dictating the course of its deliberations. That is particularly true if the court submits the special interrogatories to the jury after the general verdict has been returned. See *United States* v. *Desmond*, 670 F.2d 414, 418 (3d Cir. 1982).

In other cases, however, a district court should be permitted to decline to use special interrogatories, even in cases involving multiple predicate acts or multiple objects of a conspiracy. The problem is that special interrogatories, especially if submitted to the jury prior to the general verdict, can sometimes result in jury confusion and may unduly focus attention on a particular charge or a particular defendant, as this case illustrates.

In this case, there was ample evidence as to both the DEA objective and the IRS objective with respect to defendants Beverly and McNulty. A special interrogatory with respect to petitioner alone and with respect to Count 20 alone would give that count and petitioner a special status that would be likely to confuse the jurors, who would be left to speculate why, of all the counts and defendants, they were being given a special interrogatory with respect to only one defendant on only one count.

Similarly, a special instruction regarding petitioner's role in the offense charged in Count 20, of the sort proposed by petitioner, J.A. 39-42, would have singled out petitioner for special treatment by the jury in a way that could well have created jury confusion. Although the evidence as to petitioner was sufficient only as to the IRS objective, that did not mean that she was not a member of the conspiracy described in Count 20, or that the conspiracy that she joined did not extend to the concealment of assets from the DEA. It simply meant that petitioner was not a party to one aspect of the agreement. Yet that is a common enough phenomenon in conspiracy law; a conspirator is fully liable under the law of conspiracy even if he does not expressly agree upon, or even is unaware of, all the objects of the conspiracy. As we have noted, it is a familiar principle of the law of

conspiracy that the government "does not have to prove that the accused knew every objective of the conspiracy, every detail of the scheme's operation, or the identity of every co-conspirator." *United States* v. *Wiley*, 846 F.2d 150, 153-154 (2d Cir. 1988).

In this case, the jury could not have been misled about the government's position regarding the DEA objective. The prosecutor clearly explained to the jury during her rebuttal summation that the government's theory was that petitioner had conspired to conceal assets from the IRS. See Tr. 3571. There was therefore no significant likelihood that the jury would convict petitioner based on the DEA objective, on which there was no evidence, rather than the IRS objective, on which the evidence was ample. Under these circumstances, the district court cannot be said to have abused its discretion by declining to give the jury special interrogatories or special instructions regarding petitioner's awareness of each object of the conspiracy.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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In The

Supreme Court of the United States

October Term, 1991

DIANE GRIFFIN,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

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ARGUMENT

A. The *Stromberg-Yates* Rule Supports Griffin's Position That Objects Legally, Insufficiently Supported By The Evidence In Multiple Object Cases Constitute Grounds For Reversal.

The government in its brief argues that this Court's decisions in *Yates v. United States*, 354 U.S. 298 (1957) and *Stromberg v. California*, 283 U.S. 359 (1931) do not support Griffin's position. The government agrees that decisions such as *Stromberg* and *Yates* have set aside convictions where the jury received incorrect legal instructions as to several alternative bases for conviction which create the possibility that a rational jury might convict the defendant based upon conduct that is not a crime. However, the government states that the principle does not apply when the jury has been properly instructed and the issue is whether the evidence underlying the object is sufficient to support a conviction. Government's Br. at 6.

First, the government ignores the fact that the jury in Griffin's case received, over her objection, incorrect legal instructions. Well prior to submission of jury instructions, i.e., at the time for a motion for judgment of acquittal, the government admitted and the trial court agreed that the evidence was insufficient as a matter of law to support the Drug Enforcement Administration object of the conspiracy count. R. 340 Tr. 2615; J.A. 52. It was, therefore, legally incorrect to instruct the jury that the jury could convict Griffin either by finding guilt on the D.E.A. object or by finding guilt on the I.R.S. object. The jury as a matter of law could not convict Griffin by finding guilt on the D.E.A. object.

The Government's Instruction 20 and Government's Instruction 21 told the jury that the jury could convict by reason of the D.E.A. object. Appellant's Br. at 12 and 13; J.A. 31, 32.

The trial court refused Griffin's instructions, and, despite agreeing that the evidence was insufficient as a matter of law to find Griffin guilty on the basis of the D.E.A. object, gave the jury the instructions that allowed the jury to do just that.

Even the Seventh Circuit commented, "Finally, we do not understand why, once the government admitted it could not link Ms. Griffin to the D.E.A. objective of the conspiracy count, the district court failed to grant a partial judgment of acquittal with respect to that count". J.A. 117. The jury in the instant case received incorrect legal instructions.

Second, the government denies the fact that the instructions in this case created the possibility that a rational jury might have convicted Griffin on conduct that is not a crime. The government's position is that if the D.E.A. object had not stated a crime, was outside the statute of limitations or was unconstitutional, the *Stromberg-Yates* rule would have operated and would have required reversal. The government calls these legal insufficiencies. How would we know with the D.E.A. object being legally insufficient, the government would ask, whether the jury ignored the I.R.S. object, seized upon the D.E.A. object alone and found Griffin guilty on the D.E.A. object? The government says that what it calls factual insufficiency does not pose such a threat. A closer inspection of the case discloses that this position is untenable.

In its prosecution of Griffin the government produced and placed into evidence the fact that Griffin was one of the girlfriends of the drug king pin, Alex Beverly, that she knew and associated with the defendants in the case, that she owned the bar in which numerous drug conversations were had, that she owned the private phones and business phones upon which numerous drug conversations were had, that numerous large drug deals were initiated in the bar that she owned and in which she worked and that they were then consummated in her building next to her bar, that she conversed with the largest wholesale supplier of drugs in the case and that she lived with the drug king pin in the same apartment. However, none of Griffin's conduct amounted to an offense under the law. The volume of evidence concerning her conduct did not under the law allow the possibility that a rational jury could convict Griffin upon the D.E.A. object.

Is not the same question so aptly raised by the *Stromberg* and *Yates* cases that which must be raised in the instant case? How do we know whether the jury completely ignored the

I.R.S. object, seized upon the D.E.A. object alone and found Griffin guilty of Count 20 based on that object precluded by legal insufficiency of evidence, i.e., the conduct under the legal standard did not constitute a crime?

The government's apparent answer is that one knows because the jury would not choose the object that is not sufficiently supported by the evidence. To quote the government, "It would be unreasonable to assume that the jury would choose to reject the sufficiently proved object and rely on the insufficiently proved object instead". Government's Br. at 13. The first problem is the description of the object as the "insufficiently proved object". Such a descriptive term is misleading. The more accurate descriptive term is "the legally, insufficiently proved object". The term "insufficiently proved object" infers that any person could see the insufficiency and would never find guilt on that object. This descriptive term may be accurate when the government submits no evidence concerning an object. It may be accurate when the evidence is negligible in quantity and there is no prejudicial spillover. But it is definitely not an accurate descriptive term when the government produces a large volume of evidence in a prejudicial spillover case such as Griffin's.

The term "legally, insufficiently proved object" or "object legally, insufficiently supported by the evidence" accurately describes the situation for it allows for the very real prospect that a person trained in the requirements of legal sufficiency of evidence would recognize the insufficiency of the evidence, but that untrained lay persons would not. This would be true especially in prejudicial spillover cases such as the instant case.

The government position necessarily must be that a jury would indeed recognize legal, evidentiary insufficiency. The government suggests that this premise is so well grounded in experience that this Court should recognize a presumption that a jury will choose to decide a charge only on the object or objects that are legally, sufficiently supported by the evidence and eschew objects that do not meet the legal standard for sufficiency of the evidence. Government's Br. at 20. Such a presumption should not be indulged.

The government in its brief has not responded to Petitioner's discussion of the role played by motions for judgment notwithstanding the verdict, motions for directed verdict and motions for judgment of acquittal. Obviously it is well known that juries do return verdicts of guilty on charges that do not meet the legal standard for sufficiency of the evidence. These long standing common law and statutory motions address the well known problem that juries find guilt on charges legally, insufficiently supported by the evidence. Juries do not recognize the legal standard. Within the last year the United States Court of Appeals for the Seventh Circuit alone has reversed at least four convictions on drug conspiracy counts because of insufficiency of the evidence.[1]

This Court has perceived the real concern when one of the objects is sufficient and the other is not in *Sandstrom v. Montana*, 442 U.S. 510 (1979). In *Sandstrom* there was only one charge. It was agreed that the evidence was sufficient for a jury to convict on the charge. But there were two methods of deliberation by which the jury could have reached guilt. One was through use of a presumption as to criminal intent. The other was by proceeding to deliberate on the sufficient evidence without use of the presumption. The presumption was found by this Court to be invalid. The state argued that the jury could have found the defendant guilty on the evidence rather than by relying upon the presumption and, therefore, the verdict of guilt should be upheld. This Court in a unanimous decision rejected the state's argument:

> But, more significantly, even if a jury could have ignored the presumption and found defendant guilty because he acted knowingly, we cannot be certain that this is what they *did* do.

Id. at 526. Griffin's position is not any different. The jury in her case could have decided the case on the I.R.S. object but we cannot be certain that this is what they *did* do. The

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[1] *United States v. Townsend*, 924 F. 2d 1385, 1398 (7th Cir. 1991); *United States v. Dennis*, 917 F. 2d 1031, 1033 (7th Cir. 1990); *United States v. Kimmons*, 917 F. 2d 1011, 1016 (7th Cir. 1990); *United States v. Lamon*, 930 F. 2d 1183, 1192 (7th Cir. 1991).

government missed the point in *Sandstrom*, and the government has missed the point here too. The same crucial analysis caused reversal by the Tenth Circuit in *Newman v. United States*, 817 F. 2d 635 (10th Cir. 1987).

Without any fact finder, let alone the jury, weighing any evidence to determine if the evidence proves the defendant guilty beyond a reasonable doubt, the defendant in the government's scenario is found guilty. The defendant is effectively deprived of a jury trial, since only a judge makes the decision; and, the defendant is effectively deprived of his right to be proven guilty beyond a reasonable doubt, since the judge only determines that the evidence is sufficient to prove him guilty looking at the evidence in a light most favorable to the prosecution.

The government says that all of that is acceptable unless the insufficient object consists of failure to state an offense, violation of the statute of limitations or invalidity under the Constitution. Is the possibility that a defendant be convicted by overwhelming evidence on a charge commenced one day past the statute of limitations more odious to our sense of justice and fair play than the possibility that a defendant be convicted on evidence so lacking that the law of this country says that on such evidence no person should ever be convicted? In either scenario the evidence on the remaining object is still legally sufficient for the defendant's conviction if the jury is assumed to have deliberated upon it and agreed that it proves guilt of the defendant beyond a reasonable doubt. It is evident that if *Stromberg* and *Yates* are alive, neither scenario is acceptable. If *Stromberg* and *Yates* are dead, it does not matter because then we have agreed that speculation on the jury's verdict is sufficient.

Did the jury ever reach a decision or even deliberate upon the sufficient object? One does not know. That is the concern raised by *Stromberg* and *Yates*. Having an object insufficiently supported by the evidence no better assures us that the jury ever deliberated and found upon the remaining sufficient object than having objects insufficiently meeting the statute of limitations, insufficiently stating an offense or insufficiently meeting other Constitutional standards.

In Griffin's case we do not know and we shall never know whether the jury found guilt on the object legally, insufficiently supported by the evidence. Griffin seeks a rule of reason, the reasoned rule of *Stromberg* and *Yates* to preclude such a possibility at her re-trial.

B. *Miller v. United States* And *Turner v. United States* Do Not Trump The *Stromberg-Yates* Rule When The Object Is Legally, Insufficiently Supported By The Evidence And One Does Not Know If The Jury Decided Guilt Upon That Object.

The government in its brief posits that *Miller v. United States*, 471 U.S. 130 (1985) stands for the proposition that even if the evidence at trial fails to prove all of the allegations in the indictment (count), the sole question for a court is whether there is sufficient evidence to permit a rational jury to find the Defendant guilty on the count. Government's Br. at 8. *Miller* does not give us that learning.

In *Miller* the government initially alleged in the indictment that the defendant defrauded his insurance company by consenting to a burglary of his own business and by lying to them about the value of his loss. Before trial the government moved to strike the part of the indictment alleging consent to the burglary. The defendant objected to its removal. In other words, it was the government which wanted to remove the consent to burglary issue from the jury's consideration. *Id.* at 813, 814.

In *Miller* the government produced only proof of defendant lying to his insurer. The government produced no proof about his consent to the burglary. If anything, Miller waived the *Stromberg* issue, if he had one. Moreover, a total lack of evidence on the issue of consent to the burglary raised no specter of a jury mistaking volumes of hollow evidence for evidence capable of proving guilt beyond a reasonable doubt. Neither does the opinion report that the prosecutors argued in either opening statements or closing arguments that the defendant was guilty of consenting to the burglary.

In fact, in *Miller*, if anything the government and the judge wanted to narrow the issues before the jury to only one.

Defendant there refused that narrowing in order to preserve the variance and grand jury issues that he thought important. In the instant case Griffin sought to do what the defendant in *Miller* refused to do. She wanted only one object before the jury.

Miller cites *Turner v. United States*, 396 U.S. 398 (1970), but in no way does the *Miller* decision, essentially concerning variance and right to trial on grand jury indictment, have application in the issue raised in this appeal nor does it extend or enhance *Turner*.

Turner itself is not a conspiracy case. It is a multi-act substantive count case. *Miller* does not reach the issue now before this Court, but the government insists that *Miller* and *Turner* together have formulated principles on multi-object conspiracies. The government proffers *Turner* as the cornerstone upon which the entire edifice of multi-object conspiracy charges, multi-predicate act RICO charges and multi-act substantive charges have foundation and consequently must rely. Although a substantial line of cases has developed from the facial rule of *Turner*, *Turner* itself is a case wherein the Court did not have to concern itself with whether a jury may have found guilt on an act that was legally, insufficiently supported by the evidence and may have failed to deliberate on the act that was legally, sufficiently supported by the evidence.

The defendant in *Turner* was charged with purchasing, dispensing and distributing heroin. The record showed that the only evidence concerning an act was evidence of possession of heroin. The Court in *Turner* for reasons explained in the opinion equated a possession of heroin with purchase of heroin, but the Court could not equate possession of heroin with dispensing or distributing heroin. 396 U.S. at 421, 422.

In summary, the only evidence was that of possession of heroin. A verdict of guilty was returned. Possession and possession alone was the equivalent of purchasing. The Court, therefore, absolutely knew that the jury had found guilt on purchasing and not on dispensing and distributing. Since there was no doubt as to the jury's finding, the conviction was affirmed.

In the instant case there is no certitude as there was in *Turner*. Moreover, Griffin, unlike the defendant in the *Turner* case moved up front for a simple set of reasonable instructions to determine upon which object the jury was to find guilt, if either.

The Court in *Turner* decided the case without reference to the *Stromberg* or *Yates* rule. One can see that the Court at the time of its decision in *Turner* need not have made reference to *Stromberg* or *Yates* since the Court in *Turner* knew what the jury found and ruled that that particular finding equated to only one of the alleged three acts.

The cases which have sprung from the *Turner* case have extrapolated the surface words of *Turner* into a theory for handling multi-act charges, multi-predicate act RICO charges and multi-object conspiracy charges. That rule directly contradicts the *Stromberg* and *Yates* rule. Many of the cases that rely on *Turner* do not distinguish between acts or objects that are legally sufficient or factually sufficient.

The Court in *Turner* when citing *Crain v. United States*, 162 U.S. 625 (1896), stated, "The general rule is that when a jury returns a guilty verdict on an indictment charging several acts in the conjunctive, as Turner's indictment did, the verdict stands if the evidence is sufficient with respect to any one of the acts charged." The maxim does not condone speculation. The *Crain* case did not go that far either. One proposition that *Crain* did establish is that conjunctively pled acts were to be considered disjunctively pled acts. Originally *Crain* was not an imprimatur for speculation about specific jury findings.

Crain, an antique case, neither discusses the effect of spillover prejudice nor uncertainty over which act was decided upon by the jury. The case in essence revolves around a post verdict challenge to the pleading of "three separate distinct felonies" in one count under the form of a motion in arrest of judgment. 162 U.S. at 634. The Court in *Crain* held that the count did not allege three separate felonies but one felony that could be committed through three separate modes. Basically, the Court said that the count was properly pled and not subject to a motion in arrest of judgment for defective pleading. 162 U.S. 634, 636.

The Court in *Crain* did state that the proper remedy was referred to in *Commonwealth v. Tuck*, 20 Pick 356. The Court said, " . . . that the appropriate remedy of the accused, in order to avoid the inconvenience and danger of having to meet several charges at the same time, is a motion to quash the indictment or to confine the prosecutor to some one of the charges." This is what Griffin attempted. She sought to confine the government to the I.R.S. object in order to avoid the danger of having to meet two charges – one of which was admittedly insufficient – at the same time.

The government claim that *Stromberg* applies to objects insufficient as a matter of law and that *Turner* applies to objects insufficiently supported by the evidence is more of a government wish than a rule. Depending on which result courts have wished to accomplish, courts have applied the rule of *Stromberg-Yates* or the extrapolated rule of *Turner*.

C. The Supreme Court Has Employed The *Stromberg* And *Yates* Rule Both In Cases Having Objects Legally, Insufficiently Supported By The Evidence And In Cases With Objects Insufficient For Statute Of Limitation Reasons, Failure To State An Offense Reasons And Constitutional Reasons.

The government asserts that *Yates*, *Cramer*, *Williams* and *Stromberg* do not explicitly distinguish between legal and factual insufficiency. Government's Br. at 19. More accurately these cases, along with *Haupt v. United States*, 330 U.S. 631 (1947), show that the Supreme Court has employed the *Stromberg-Yates* rule in both cases having objects legally, insufficiently supported by the evidence and in cases having objects insufficient for statute of limitations reasons, failure to state an offense reasons and Constitutional reasons.

The government proves Griffin's point in the citation of *Cramer v. United States*, 325 U.S. 1 (1945). The government states, "The Court questioned whether lying to the F.B.I. under the circumstances could legally constitute treason, but the Court found no need to reach that issue because it reversed on the ground that other charged acts of treason did

not, as a matter of law, constitute treason". Government's Br. at 19. That is absolutely not the basis upon which the Court decided *Cramer*.

In essence, the prosecution in *Cramer* submitted three overt acts to the jury. The Court inspected two of the three overt acts for sufficiency of the evidence. As the Court said, "Whatever the averments might have permitted the government to prove, *we now consider their adequacy on the proof as made*." (Emphasis added). The Court proceeded to discuss the evidence on overt acts one and two for the next eleven pages of the opinion.

Finally, the Court ruled, "We hold that overt acts one and two are insufficient as proved to support the judgment of conviction, which accordingly is reversed." 325 U.S. 48. If it can be said the Court decided *Cramer* on the legal sufficiency, it is because the Court found the evidence as a matter of law insufficient. This is exactly Griffin's point. Insufficient evidence is a matter of law. The critical language of the *Cramer* opinion on the effect of the insufficiency of the evidence on two of the three overt acts is contained in footnote 45 on page 36 of the opinion.

> The verdict in this case was a general one of guilty, *without special findings as to acts on which it rests*. (Emphasis added) Since it is not possible to identify the grounds on which Cramer was convicted, the verdict must be set aside if any of the separable acts submitted was insufficient. *Stromberg v. California*, 283 U.S. 359, 368; *Williams v. North Carolina*, 317 U.S. 287, 292.

325 U.S. at 36. The Court did not hesitate in applying the *Stromberg* rule when two of the three overt acts were insufficiently supported by the evidence. Not one mention is made of a willingness to extrapolate *Crain* as support when in *Cramer* a third overt act may have been sufficiently supported by the evidence.

Two years after *Cramer* this Court reviewed another sufficiency of the evidence multi-overt acts case in *Haupt v. United States*, supra. This Court clearly recognized that the

Stromberg-Cramer rule was the applicable one. In addition, the Court recognized that in its prior *Cramer* decision it had held that reversal was required, " . . . if any of the acts were insufficient or insufficiently proved." 330 U.S. at 641, n. 1. The government attempts to minimize the obvious impact of the Court's deliberate decision to apply the *Stromberg-Cramer* rule. The government argues that it is only *dicta* in a passing footnote. Government Br. at 24. When the Court previously cited the *Stromberg* rule as the law applicable to the resolution of the *Cramer* factual insufficiency case, it also cited the pertinent law in a footnote. Footnote citation in no way diminishes the obvious declaration by the Court that the *Stromberg-Cramer* rule was equally applicable to insufficient evidence situations.

If any case contains *dicta*, it is the *Miller* case which turned not at all on the issue now before this Court but on whether the defendant's right to trial on a grand jury returned indictment was violated and whether the proof at trial caused a fatal variance with the charge.

The Court's decisions in *Cramer* and *Haupt* demonstrate that the Court has considered factual insufficiency not to be any less an obstacle to conviction than legal insufficiency. The Court recognized in *Cramer* and *Haupt* that the jury cannot be expected to discern the legal insufficiency of the evidence any better than other types of legal insufficiency.

D. The Well Accepted Fact That Juries Do Not Discern The Legal Sufficiency Of The Evidence Does Not Affect The Jury's Traditional Discharge Of Its Function.

The acceptance of the fact that juries do not discern the legal insufficiency of the evidence does not affect the jury's traditional discharge of its function. Neither *Richardson v. Marsh*, 481 U.S. 200, 206-207 (1987) nor *Duncan v. Louisiana*, 391 U.S. 145 (1968) justify the government's confidence that juries are able to see as lawyers and judges do that although the prosecution may produce a large volume of

evidence against the defendant in a trial with co-defendants against whom the evidence is highly probative of guilt, the evidence against the defendant individually does not meet a legal standard of proof.

The Court in *Richardson v. Marsh* pointed out that the almost invariable assumption of the law that jurors follow their instructions is a pragmatic one. 481 U.S. at 207, 211. Moreover, the assumption that jurors follow their jury instructions aids Griffin since the jury in her case was instructed that the defrauding of either of the D.E.A. or the I.R.S. was sufficient for a conviction.

In *Zant v. Stevens*, 462 U.S. 862 (1983) the jury expressly made specific findings; therefore, this Court on review did not actually make application of the *Stromberg* and *Yates* rule, but this Court noted that the *Stromberg* and *Yates* rule would otherwise have been applicable and reiterated that *Cramer* case, a factual sufficiency case, was one of the cases in which the *Stromberg* and *Yates* rule had been applied. *Zant*, 462 U.S. at 881.

This Court in *American Medical Association v. United States*, 317 U.S. 326 (1943) was faced with a claim by the petitioner therein that the conspiracy count of the indictment alleged five separate charges. Petitioner claimed that he was entitled to have the trial court rule upon the "legal sufficiency" of each of these charges. This Court said that it was unnecessary to do so since each of the five was not a separate charge in and of itself but only a step towards the single charge in the count. The steps did not and could not stand alone.

The difference between *American Medical Association* and the instant case is that the two objects charged to Griffin could stand as two separate conspiracy offenses. The steps charged in *American Medical Association* were, in effect, surplusage. They were not necessary to the charge of conspiracy. The government in *American Medical Association* could not prove the step without "more" and have a conviction. The

"more" would have been the agreement itself. The government in Griffin's case had a conviction if it proved either one of the two objects. Each of the two objects had its own purpose and stated a separate conspiracy. The steps in *American Medical Association per se* did not have their own purpose. Each step was not a separate conspiracy. The Court in *American Medical Association* held that the count charged but one conspiracy. Why did the Court proceed through this analysis? Petitioner submits that the Court did so because if there had been five separate charges, the *Stromberg* rule would have been applied.

E. Griffin Was Entitled To Submission Of Her Proposed Special Interrogatories Or A Jury Instruction That Removed The Object Legally, Insufficiently Supported By The Evidence From The Jury's Consideration.

The government agrees, " . . . that special interrogatories can be a valuable tool in cases such as conspiracy or RICO prosecutions where there is doubt as to the legal validity of a particular object or predicate act." Government's Br. at 27. In support of this proposition the government cites *United States v. Aguilar*, 883 F.2d 662 (9th Cir. 1989), *cert. denied*, 111 S. Ct. 751 (1991); *United States v. Coonan*, 837 F. 2d 886 (2d Cir. 1988); and *United States v. Ruggiero*, 726 F. 2d 913 (2d Cir.) *cert. denied*, 469 U.S. 831 (1984).

In *Ruggiero* it appears that if petitioner there had moved the trial court to withdraw the defective predicate act from jury consideration, the government would have agreed with the appellant's contention that the count one RICO conspiracy charge was reversible. In *Ruggiero* it was impossible to determine if the jury picked the impermissible gambling conspiracy charge as one of the two predicate acts out of the thirteen conspiracies charged as predicate acts.

In support of its position the government in *Ruggiero* relied upon *United States v. Natelli*, 527 F. 2d 311 (2d Cir. 1975), *cert. denied*, 425 U.S. 934, 96 S. Ct. 1663, 48 L. Ed.

2d 175 (1976); *United States v. Bonacorsa*, 528 F. 2d 1218 (2d Cir.), *cert. denied*, 426 U.S. 935, 96 S. Ct. 2647, 49 L. Ed. 2d 386 (1976); *United States v. Goldstein*, 168 F. 2d 666 (2d Cir. 1948); *United States v. Mascuch*, 111 F. 2d 602 (2d Cir.), *cert. denied*, 311 U.S. 650, 61 S. Ct. 14, 85 L. Ed. 2d 416 (1940). The Second Circuit said that these cases involved sufficiency of the evidence. The court laid the inference that any requirement that a defendant make a motion to withdraw defective predicate acts in order to later complain of their sufficiency was not applicable in a legal sufficiency case. The court also implied that defective predicate acts in sufficiency of the evidence cases must be withdrawn from jury consideration when the defendant objects to their submission to the jury. Griffin did object in her case. The defective object should have been withdrawn.

Coonan supports Griffin's position before this Court. In *Coonan* the government sought through a mandamus to preclude the district court from submitting special verdicts to the jury. The government sought to ensure a general verdict. The Second Circuit denied the mandamus. It said:

> In other words, what the government seeks to protect is the possibility of its obtaining guilty verdicts through prejudicial spillover from the numerous violent and otherwise criminal acts before it. When examined in this light, the government's position is not simply that it is entitled to a general verdict but that it has a right, enforceable by mandamus, to prevent any and all use of special interrogatories separately from a general verdict no matter how necessary they may be to protection of the defendant's rights.

837 F. 2d at 890. The court's rationale strikes at the very heart of the reason that Griffin needed either to remove the D.E.A. object from the jury's consideration or to submit the special interrogatories to the jury. The reason was to preclude the government from obtaining a guilty verdict on the D.E.A.

object through prejudicial spillover from the numerous criminal drug acts before it.[2]

The court in *Coonan* rejected the government's claim that the government possesses a right to a jury trial coextensive with that possessed by a criminal defendant. The court commented, " . . . the right to a jury trial remains 'principally' for the benefit of the accused. *Singer*, 380 U.S. at 33, 85 S. Ct. at 789 (citing *Patton*, 281 U.S. at 312, 50 S. Ct. at 263)." The court continued, "Moreover, the criminal law's historical preference for general verdicts, much like its traditional distaste for special interrogatories, stems from the unique rights of the criminal defendant." The court finally said, "Most importantly, however, the government, unlike the defendant, may not rightfully seek the benefit of an irrational verdict; although juries may freely temper the rigor of the law, they surely may not enhance it." *Coonan*, 837 F. 2d at 891.

The only learning provided by *Aguilar* is that a counsel may waive the issue of a special verdict if counsel fails to request it. *Aguilar*, 883 F. 2d at 691. The court reminded that this rule was a requirement grounded in traditional efficiency and fairness. The *Aguilar* case itself actually revolved around the possibility of a non-unanimous verdict.

The government in its brief states; "The government often proposes the use of special interrogatories in such cases in order to avoid the need for a retrial if one predicate act or

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[2] Commentators have noted the efficacy of special verdicts in eliminating prejudice. Special interrogatories share that efficacy. "Special verdicts minimize the jury's prejudice and sympathy in most cases because it is often not readily apparent which side the jury's findings will favor."

"Special verdicts impose a logical structure on the jurors' responses, requiring them to think with their heads rather than with their hearts. Focusing the jury on the factual issues rather than on who wins confines the jury to its proper role as an impartial, rational finder of fact and reduces prejudicial distractions." Faulkner, *Using The Special Verdict To Manage Complex Cases and Avoid Compromise Verdicts*, 21 Arizona State Law Review 297, 314 (1989).

object turns out to have a legal flaw". Government's Br. at 28. The government cites as examples *United States v. Boffa*, 688 F. 2d 919 (3d Cir. 1982), *cert. denied*, 465 U.S. 1066 (1984); *United States v. Palmeri*, 630 F. 2d 192, 202-203 (3d Cir. 1980), *cert. denied*, 450 U.S. 967 (1981); *United States v. O'Looney*, 544 F. 2d 385, 392 (9th Cir.), *cert. denied*, 429 U.S. 123 (1976).

In *O'Looney* the trial court gave a special interrogatory because the jury wrote a note stating that it was definite on one object but not on the other. Obviously the jury felt that the evidence was sufficient on one but not on the other. *O'Looney*, 544 F. 2d at 391, n.4. With this special verdict the jury found guilt on one object but not on the other. *O'Looney*, 544 F. 2d at 392. The court used the special verdict with agreement by the defense to determine upon which there was a finding of guilty and upon which there was a finding of not guilty. Griffin should have been allowed her special interrogatories so that the jury could tell on which object there was a finding of guilty.

In *Palmeri*, the court thought it was a proper use of special interrogatories to employ them " . . . to decrease the likelihood of juror confusion and to aid the jury in concentrating on each specific defendant, and the charges against him, rather than incriminating one potentially innocent defendant solely on the basis of his association with the others." This was the aim of Griffin's special interrogatories in her case.

In *Boffa* the Third Circuit in reversing convictions that relied on legally insufficient acts cited as precedent one case that reversed a conviction because of an object legally, insufficiently supported by the evidence and one case that reversed because of an object that failed to state a crime. See respectively *United States v. Dansker*, 537 F. 2d 40, 51 (3d Cir. 1976), *cert. denied*, 429 U.S. 1038, 97 S. Ct. 732, 50 L. Ed. 2d 748 (1977); *United States v. Kavazanjian*, 623 F. 2d 730, 739 (1st Cir. 1980).

The government in its brief cites the 1953 case of *Stein v. New York*, 346 U.S. 156 (1953) for the general statement that

this Court and others have discouraged routine use of the practice of submitting special interrogatories. Government Br. at 28. But *Stein's* facts do not give rise to the concern that arises in multiple-predicate act or multiple-object charges. The *Stromberg-Yates-Cramer-Haupt* rule grew from that concern. More importantly, *Stein* predates the substantial predilection of prosecutors to bring multiple-object conspiracy and multiple-predicate act RICO indictments. It is in these types of charges that undisclosed jury choices may easily do injustice or cause costly re-trials. Simple and appropriate special interrogatories, especially when requested by the defendant, disclose critical jury choices, preclude prejudicial spillover, preclude conviction on legally or factually insufficient objects or predicate acts and preclude the need to retry these cases.

F. Submission Of The Special Interrogatories In Griffin's Case Would Not Have Resulted In Jury Confusion But At Most Would Have Properly Drawn Attention To The Fact That Griffin Could Not Be Convicted By Reason Of The D.E.A. Object.

The government in its brief warns that submission of the special interrogatory, " . . . especially if submitted to the jury prior to the general verdict, can sometimes result in jury confusion and may unduly focus attention on a particular charge or a particular defendant, as this case illustrates." Government's Br. at 29. The removal of the D.E.A. object with respect to Griffin or submission of Griffin's special interrogatories would not have caused juror confusion; on the contrary, if the jurors were to be confused by submission of two simple special interrogatories in Griffin's case, they definitely needed to have either the D.E.A. object removed from their consideration or the court's direction to separately consider each of the two objects.

Any confusion that this jury may have suffered from arose from the government's submission of a large volume of evidence of Griffin's acquaintanceship with large scale drug

dealers and from the government prosecutors' opening statements and closing arguments, both of which advised the jury that Griffin was still charged with conspiracy to defraud the D.E.A. and set out what elements were needed to convict her of it. In closing argument the government confirmed that she was charged with conspiracy to defraud the D.E.A. The government advised the jury how the element had to be met. In rebuttal the government told the jury that she was guilty of conspiracy to defraud the D.E.A. by reason of what she saw, implying that she saw controlled substances. The government prosecutor's weak, last minute, objection induced disclaimer did not overcome the government's previous lengthy insistence that Griffin be convicted on the conspiracy to defraud the D.E.A. Moreover, the trial court's instructions invited the jury to deliberate on the D.E.A. object and to find guilt upon it as the solo basis for conviction on Count 20.

The government argues against proper jury instructions or special interrogatories because such would have given Griffin a special status and would have the jurors speculating why she alone had a special interrogatory on one count. Government Br. at 29. If the jurors were subject to such wonderment by submission of a special interrogatory, they were in absolute, dire need of special interrogatories in the case because Griffin had a special status and if the jury did not realize it – and evidently the government agrees with Griffin that they did not realize it – the jury would have treated Griffin just like co-defendants McNulty or Beverly by possibly finding her guilty on the D.E.A. object alone.

G. The Issue Of Whether Or Not The Prosecutor's Disclaimer Of Purpose As Stated In Rebuttal Argument Assures That The Jury Did Not Decide Guilt Upon The D.E.A. Object Should Have No Effect On This Court's Decision To Continue To Apply The *Stromberg* And *Yates* Rule To Objects Legally, Insufficiently Supported By The Evidence.

The government says that the jury could not have been misled about the government's position regarding the D.E.A. object.

Government's Br. at 30. Such an argument is not relevant to a determination of what rule should apply in multiple-object conspiracies or multiple-predicate act RICO charges. If the Court is certain that this jury could not possibly have reached determination on the D.E.A. object after the government prosecutor's disclaimer of position, then no reversal would lie even if the *Stromberg* and *Yates* rule applied. For reasons previously set out in this argument, Griffin strongly suggests that the government's manner of prosecution allows no such certainty. Additionally, the Seventh Circuit decided Griffin's case on the basis of *Turner* and " . . . the distinction between legal and factually unsupported objects in multi-object conspirarcy cases." *United States v Beverly*, 699 F. 2d 337, 365 (1990); J.A. 117.

Meanwhile the trial court submitted instructions on the law to the jury that told the jury that it was proper to convict by reason of the D.E.A. object alone. Griffin was entitled to the protection of the law. The government vigorously resisted that protection. The district court did not afford her that protection. Finally, to quote the government's brief, "Our judicial system presumes that jurors follow the trial judge's instructions on the law. See *Richardson v. Marsh*, 481 U.S. 200, 206-207." Government's Br. at 20. Should it not be presumed the jury followed the trial court's misinstruction here?

H. The *Stromberg-Yates* Rule Applies To Objects That Do Not Meet The Standards Of The Law.

The possibility that a person be convicted on a charge where the law says that he may not be convicted is anathema to our sense of justice. No waiver rule should ever be countenanced in such situations. But even more, a criminal defendant who objects in advance to the submission of an insufficient object to a jury for its consideration of guilt or innocence in a blind, multiple-object charge should without question have the benefit and protection of the reasoned *Stromberg-Cramer-Haupt-Yates* line of cases. If the defendant

waives the historical reasons given for reluctance to submit special interrogatories in criminal cases and seeks their submission, then there is no rational reason not to afford that defendant the assurance that the jury is not carried away by prejudice to find guilt on an object legally, insufficiently supported by the evidence. The *Stromberg-Cramer-Haupt-Yates* rule is one of reason and elucidation. The government's proposed rule is one of guess, speculation and obfuscation. Reason and light ought to prevail.

CONCLUSION

The judgment of the Court of Appeals ought to be reversed and this case remanded to the district court for a new trial.

Respectfully submitted,

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